Supreme Court of the United States,

OCTOBER TERM, 1915.

KNAUTH, NACHOD & KUHNE, *Petitioners,* *against* LATHAM & COMPANY and others, *Respondents.*	No. 420.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, *Appellees.*	No. 656.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* vs. MAURICE E. A. WESTPHALEN and others, *Appellees.*	No. 657.

MOTION.

THE PETITIONERS AND APPELLANTS appear and MOVE for an order (pursuant to the provision of Rules 32, 6, 22 and 26) that these cases be advanced and heard together, on the ground that the only question at issue is "the question of the jurisdiction of the Court below" and that said three

cases involve "the same question". The petitioners and appellants ask that the above cases be advanced for hearing on March 8, 1916, or such other time as the Court shall deem meet.

STATEMENT.

Briefly stated, the facts and objects of the motion are as follows:

1. The respondents, the Receivers in Bankruptcy of Knight, Yancey & Company, filed a bill in equity in the United States Circuit Court for the Southern District of Alabama and said court thereon sequestered 4200 bales of cotton. (*Transcript of Record in No. 420, pages 19–21.*) The petitioners were then made defendants in said suit, as unknown parties that claimed an interest in said cotton, and called upon to answer said bill, by an amendment thereof. (*T. of R. in No. 420, pages 22–23.*) Said court then permitted the respondents, Latham & Company, to substitute for said cotton a forthcoming bond and, on the filing thereof, directed the Marshal to deliver said cotton to them. (*T. of R. in No. 420, page 29.*) Being thus called upon to do so and the proceeds or substitute for said cotton being *in custodia legis*, the petitioners answered said bill and, by leave of court, filed a cross-bill or whatever it should be called setting forth their interest in said cotton. (*T. of R. in No. 420, pages 33–34, 35, 60, 61–62, 64, 69, 82–83.*) Said Receivers were succeeded by the respondent Trustee. (*T. of R. in No. 420, pages 43–44.*)

> "The amended cross-bill sets up that Knight, Yancey & Co. obtained from the appellants $98,005.58 by means of forged bills of lading, and that the money of which they were defrauded was invested in the assets involved in the suit."
>
> *Knauth, Nachod & Kuhne* vs. *Lovell, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*

2. Said Circuit Court subsequently granted a motion to strike out said cross-bill, on the ground that the court had no jurisdiction and that the petitioners' remedy was to present to the bankruptcy court a claim to the pro-

ceeds of said cotton or bond, if any. (*T. of R. in No. 420, pages 103, 104; Lovell* vs. *Latham & Co. et al., 186 Fed. Rep. 602, 603.*) The decree striking out said cross bill was reversed, however, on appeal. (*Knauth, Nachod & Kuhne, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*) Nothing daunted, the respondents then moved to dismiss the petitioners' cross-bill and said motion was granted, on the ground that, "assuming that the cross-complainants have and can trace a trust fund into said cotton", said court had no jurisdiction and, therefore, that the petitioners' cross-bill should be dismissed. (*T. of R. in No. 420, pages 124–125; Lovell et al.* vs. *Latham & Co. et al., 211 Fed. Rep. 374, 379.*) The decree dismissing the petitioners' cross-bill was modified on appeal, so as to show that it was without prejudice, and as thus modified affirmed, on the ground that the court was without jurisdiction. (*T. of R. in No. 420, pages 139–140; Knauth, Nachod & Kuhne* vs. *Latham & Co. et al., 219 Fed. Rep. 721, 722, 723.*)

3. To review said determination, this Court granted a writ of *certiorari.* (*T. of R. in No. 420, page 146.*)

4. The above cases No. 656 and No. 657 were then pending in the District Court for the Northern District of Florida. They differed from the case in Alabama only in the technical particular that, instead of a cross-bill, they were original suits of an auxiliary and ancillary character. In the suits in Florida the appellants, Knauth, Nachod & Kuhne, presented the same claim to cotton and proceeds thereof in the custody and exclusive jurisdiction of said court. (*T. of R., in No. 656, Fols. 11–16; T. of R. in No. 657, Fols. 8–14.*) After the decision of the Circuit Court of Appeals in the case from Alabama, the appellees in the cases in Florida pressed to argument their motions to dismiss the amended bills of the appellants, Knauth, Nachod & Kuhne. The court in Florida had previously held that it had jurisdiction, by denying motions to quash service and motions to dismiss the original bills. (*T. of R. in No. 656, Fol. 103; T. of R. in No. 657, Fol. 101.*) The appellants, Knauth, Nachod & Kuhne, filed ob-

jections to said motions to dismiss on the ground, among others, that the court was thus asked to deprive them of property without due process of law, contrary to Amendment V and other provisions of the Constitution. This objection was urged on the allegations of the amended bills, which were admitted by the motions to dismiss, that the court had impounded and sequestered the property of the appellants, Knauth, Nachod & Kuhne, within its exclusive jurisdiction and that, to refuse to hear and enforce their right to the same, was to deprive them of their property without due process of law. (*T. of R. in No. 656, fols. 105-106; T. of R. in No. 657, fols. 103-105.*) The Court granted said motions on the ground that it had no jurisdiction and allowed appeals to this Court. No opinion was written, except as expressed in the orders appealed from, but the District Judge stated to counsel that he felt constrained to follow the decision of the Circuit Court of Appeals above mentioned. (*T. of R. in No. 656, fols. 110-113, 122-126; T. of R. in No. 657, 106-109, 115-118.*)

4. The object of the motion is to facilitate a disposition of the cases. The Court should not be asked to hear three separate cases which present the same question of jurisdiction, particularly under the facts and circumstances above set forth. The petitioners and appellants are being prejudiced by the lapse of time and the loss of evidence. The question of jurisdiction will not justify extended argument, as the petitioners and appellants submit, because it has been passed upon repeatedly by this Court. The cases can be readily decided and, if the jurisdiction of the courts below be sustained, remanded for hearing and determination on the merits.

Arthur v. Briesen
Of counsel for petitioners and appellants,
25 Broad Street,
New York, N. Y.

George T. Hogg,
Of Counsel.

To Counsel for Respondents and Appellees.

PLEASE TAKE NOTICE that, on the printed records in the cases above mentioned, the foregoing motion will be submitted to the Supreme Court of the United States at Washington, D. C., on the 31st day of January, 1916, at the opening of the Court on that day or as soon thereafter as counsel can be heard; and that, in support of said motion, a memorandum or brief of which the annexed is a copy will be submitted to the Court.

Dated January 6, 1916

Arthur v. Briesen
Of counsel for petitioners and appellants.
25 Broad Street,
New York, N. Y.

George T. Hogg,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

KNAUTH, NACHOD & KUHNE, *Petitioners,* *against* LATHAM & COMPANY and others, *Respondents.*	No. 420.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, *Appellees.*	No. 656.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* vs. MAURICE E. A. WESTPHALEN and others, *Appellees.*	No. 657.

MEMORANDUM FOR PETITIONERS AND APPELLANTS.

POINT I.

The question of jurisdiction is all that the parties are entitled to have decided by this Court, because (1) that was the only question decided in the courts below and, so far as these cases are concerned, this is a Court of review; (2) if any of the bills of complaint be defective they can be

amended; and (3) that is the only question which, in view of the facts of these cases and the division by Congress of appellate jurisdiction between this Court and the Circuit Court of Appeals, the parties are entitled to have decided by this Court.

Rules 19 and 28, Present Equity Rules.
§§ 128 and 238, Federal Judicial Code as am'd by Act approved Jan. 28, 1915.

The Court is vested by law with such a broad discretion that it is assumed that it will determine the scope of its review according to the facts and circumstances of each case. For that reason no selection of cases supporting this point has been made. The petitioners and appellants would like nothing better than that this Court should take up the merits of their bills in each of the above cases and point out any defects therein and what facts must be established to sustain the claim therein set forth. In view, however, of the division of appellate jurisdiction that Congress has made for the courts of the United States and the demands on the time and attention of this Court, for the disposition of questions assigned to it, they have no doubt that the Court will feel constrained to confine itself to the question that the parties are entitled to have decided viz.: the question of the jurisdiction of the courts below.

POINT II.

The appellants, having filed objections to the motions to dismiss their bills in No. 656 and No. 657, based on a constitutional right to claim property impounded and sequestered by the court (***Fols. 105-106 and 103-104***)**, could appeal only to this Court. Appeals to the Circuit Court of**

Appeals are authorized in cases "other than those in which appeals * * * may be taken direct to the Supreme Court."

§§ 128 and 238, Federal Judicial Code, as am'd by Act approved Jan. 28, 1915.

The power of the District Court to impound and sequester the property in question was subject to the constitutional inhibition that the petitioners and appellants should not be deprived of their property without due process of law. They were entitled to present their claim, as a matter of right and not of favor, and have it heard and determined.

Coe vs. *Armour Fertilizer Works, 237 U. S. 413, 425, 426.*

POINT III.

The motion should be granted and these cases advanced for hearing on March 8, 1916, or such other time as the Court shall deem meet.

Respectfully submitted, January 6, 1916.

Arthur v. Briesen,
Of Counsel for Petitioners and Appellants,
25 Broad Street,
New York, N. Y.

Thomas M. Stevens, Mobile, Ala.
W. H. Watson, Pensacola, Fla.
George T. Hogg, New York, N. Y.
Of Counsel.

FILED
NOV 18 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1916.

KNAUTH, NACHOD & KUHNE,
Petitioners,
against
LATHAM & COMPANY AND OTHERS,
Respondents.
No. 98.

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
Appellants,
against
WILLIAM S. LOVELL, AS CUSTODIAN, ETC. AND AS TRUSTEE ETC. AND OTHERS,
Appellees.
No. 259.

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
Appellants,
against
MAURICE E. A. WESTPHALEN AND OTHERS,
Appellees.
No. 260.

BRIEF FOR LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS AND APPELLEES.

WALKER B. SPENCER,
CHARLES PAYNE FENNER,
For Respondents and Appellees.

The Evening Post Job Printing Office, Inc., 154 Fulton St., N. Y.

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Supreme Court of the United States,

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KNAUTH, NACHOD & KUHNE, Petitioners, AGAINST LATHAM & COMPANY and others, Respondents.	No. 98.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, Appellants, AGAINST WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, Appellees.	No. 259.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, Appellants, AGAINST MAURICE E. A. WESTPHALEN and others, Appellees.	No. 260.

BRIEF ON BEHALF OF LATHAM & COMPANY AND AMERICAN SURETY COMPANY, RESPONDENTS AND APPELLEES.

Brief Statement of Proceedings.

Case No. 98 (hereinafter called the Mobile case) comes here on *certiorari* to review a decree of the United States Circuit Court of Appeals for the Fifth Circuit (219 Federal

Reporter, 721), affirming a decree of the District Court of the Southern District of Alabama (Record, pp. 121–125) sustaining motions in behalf of Latham & Company and American Surety Co. and Lovell, Trustee in Bankruptcy of Knight, Yancey & Co. (Record, pp. 109–120), to dismiss the cross bills or bills of intervention filed by Knauth, Nachod & Kuhne, petitioners herein, in a plenary suit brought in the Circuit Court for the Southern District of Alabama by said Lovell, as Trustee in Bankruptcy of Knight, Yancey & Co. against Latham & Company to recover certain four thousand two hundred (4,200) bales of cotton on the ground that the latter had obtained same from the bankrupts by preferential transfer.

The motions to dismiss set up want of equity in the bills and raised additionally the question whether such a cause of action as was stated by the cross-bills could be maintained in another court than that of the Bankruptcy, to wit: the District Court for the Northern District of Alabama. The District Court for the Southern District of Alabama, having superseded the Circuit Court for that District, sustained the motions on both grounds, and not alone for want of jurisdiction, as stated on page 2 of petitioners' brief. (See Opinion, Record, p. 125.)

With a slight and unimportant modification the Circuit Court of Appeals for the Fifth Circuit affirmed this decree, and thereafter petitioners applied for and obtained a writ of *certiorari* from this Court.

It is unnecessary to consider any other proceedings in said case, either in the Circuit Court or in the Circuit Court of Appeals, than those based on the motions of respondents to dismiss. (Record, pp. 109–120.)

With reference to case No. 259 (hereinafter referred to as the Pensacola case), the statement of proceedings by the appellants in their brief (pp. 12–14) is substantially correct.

Brief Statement of the Case made by the Amended Bill in the Mobile Case.

It will be unnecessary to consider the original cross-bill filed by petitioners, as all of its allegations are embodied in the expansive amended cross-bill. This amended

cross-bill, the Court will find, teems with irrelevant and redundant and utterly vague allegations, and justly merited the criticism of the Court of Appeals of New York, which had occasion, in the case of *Jeffe* vs. *Weld*, 102 N. E. 1104, to pass upon its counterpart filed by the petitioners in that case, that Court saying that the bill was " prolix to a degree not easy to characterize ".

Stripped of its mass of redundant and irrelevant allegations, the essential facts alleged by the amended cross-bill may be stated as follows:

1. The petitioners were bankers doing business in New York, and particularly were so engaged during the period from the 5th to the 18th of April, 1910, and were, as a part of their business, in the habit of buying foreign bills of exchange drawn on persons in Europe against sale and shipments of cotton. (Record, p. 64, par. 6.)

2. That during said period, from the 5th to the 18th day of April, 1910, the firm of Knight, Yancey & Company caused to be issued and sent to New York some thirteen drafts, or foreign bills of exchange, to which were attached thirteen export bills of lading purporting to show that thirteen hundred bales of cotton had been shipped by Knight, Yancey & Company for transportation to several European ports. These drafts were drawn to the order of Knight, Yancey & Company, and the cotton mentioned in the bills of lading was to be delivered to the order of Knight, Yancey & Company, and the insurance certificates attached were payable, in case of loss, to Knight, Yancey & Company, and all of these documents were endorsed in blank by Knight, Yancey & Company. (Record, p. 65, par. 9.)

3. That these drafts, bills of lading and insurance certificates were forwarded to an agent of Knight, Yancey & Company in New York for the purpose of selling same to the petitioners or other bankers, as genuine and valid documents, when in fact they were not, and thereby to obtain money of the petitioners or other bankers on the strength thereof. (Record, p. 65, par. 9.)

4. That the petitioners were misled and deceived, and believing that said documents were genuine, purchased same, and delivered to said agent of Knight, Yancey & Company the sum of $98,005.58, and said agent received said money in that capacity, and delivered same, after possibly deducting his commission, to Knight, Yancey & Company. (Record, p. 65, par. 9.)

5. That, as a matter of fact, said bills of lading were forgeries perpetrated by John W. Knight, or some other person. No cotton was ever delivered on said bills of lading, and the drafts drawn against them were not accepted or paid, and were duly protested. (Record, p. 66, par. 11.)

6. That the method in which these drafts and documents were handled by Knight, Yancey & Company was as follows:

The bills of lading were forged by John W. Knight, or some other person acting for the firm, and were delivered by said firm to the First National Bank of Decatur, Alabama, for the purpose of forwarding the same to New York for sale. To these forged bills of lading were attached foreign bills of exchange and insurance documents, and at the time of delivery of these bills of lading and drafts to the First National Bank of Decatur, for the purpose aforesaid, a domestic or currency draft was drawn by Knight, Yancey & Company on their agent or broker in New York, for the approximate sum of the foreign bills of exchange in United States currency, and this domestic draft was deposited with said bank, and by it placed to the credit of said firm. As collateral security to insure the acceptance and payment of the domestic drafts, the bank took other collateral security, ample for its protection against non-acceptance or non-payment of said domestic drafts. (Record, pp. 66–67, pars. 11 and 12.)

7. That the thirteen foreign bills of exchange purchased by the petitioners were all deposited with the First National Bank of Decatur for transmission as aforesaid to

New York between the 5th and 18th days of April, 1910, and were purchased by the petitioners from F. Van Gerpen, acting as agent of Knight, Yancey & Company, and after Van Gerpen had obtained from petitioners the price of said sale, he accepted and paid the domestic drafts for approximately the aggregate face amount of said thirteen foreign bills of exchange, and accounted for the proceeds thereof, and remitted the same to Knight, Yancey & Company, and by them same was deposited, together with other moneys of their own, with the First National Bank of Decatur, or other bank, except as some part of the proceeds may have remained in the hands of Van Gerpen, and afterwards paid over to receivers or Trustee in Bankruptcy. (Record, p. 67, par. 12.)

8. That Knight, Yancey & Company, having deposited the money of petitioners, with other moneys of their own, in the First National Bank of Decatur, or other depositaries, held their entire bank credit or account receivable thus created for the account and in trust for the petitioners, at least to the amount of petitioners' money thus deposited. (Record, p. 68, par. 14.)

9. That at the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, said bank credit was expended (except so far as the same may have remained on hand at the date of bankruptcy, as set forth in Schedule 17 annexed to the bill) for certain cotton, and in the creation of certain credits with brokers called deposits for the purchase of cotton. Some of the said brokers' credits were redeemed in whole or in part, and the money again deposited with the First National Bank of Decatur and again reunited; and some of said bank credits, brokers' credits and other credits representing said trust fund were outstanding at the time of adjudication in bankruptcy, and were subsequently collected by the receivers and the trustee. Certain of the cotton paid for out of said trust fund, or the proceeds thereof, came into the hands of the receivers and trustee, and the estate in bankruptcy has thus been enriched by the money of petitioners, and the receivers and trustee hold all such

cotton, or the proceeds thereof, and all such credits, or the proceeds thereof, in trust for the benefit of petitioners to the extent of $98,005.58. (Record, p. 68, par. 14.)

10. That petitioners are not able to specify all of the cotton paid for out of their money, or all of the money or bank and brokers' credits subject to a trust in their favor, but annex to their bill twenty-one (21) schedules, showing some fifteen or sixteen thousand bales of cotton purchased with their money, and several hundred thousand dollars of monies and credits likewise created, and showing also seventy-six hundred and four (7,604) bales of cotton purchased with trust funds in the possession of the trustee at the time the cross-bill was filed, together with one hundred and two thousand nine hundred and sixty-four and 22/100 dollars ($102,964.22) of cash, the proceeds of other cotton and credits belonging to said trust fund collected by the trustee (Record, pp. 68–69, par. 15.)

11. That all of said cotton and monies which they allege were partly in the hands of the trustee, and partly in the hands of other persons (some of whom even were not parties to this suit), were chargeable with a trust in their favor. (Record, pp. 69–70, pars. 16 and 17.)

12. That the forty-two hundred (4,200) bales of cotton received by Latham & Company, and which were the subject-matter of the suit between Lovell, trustee, and Latham & Company, were received by Latham & Company as an unfair preference from Knight, Yancey & Company, and the transaction was void as to petitioners. (Record, pp. 70–71, pars. 18 and 19.)

13. The prayer for relief is as follows:

(*a*) That it be decreed that the sum of $98,005.58 belonging to petitioners was received by Knight, Yancey & Company, between the 5th and 18th days of April, 1910, and was held by them as the money of petitioners;

(*b*) That Knight, Yancey & Company, and the trustee in bankruptcy, render an account for said money, and set

forth a true account of all cotton or other property purchased, either in whole or in part, with their said money, and render a true account of the disposition made of said cotton and money; a true account of what part of said cotton, or the preceeds thereof, came into the hands of the trustees;

(*c*) That the transfer of Knight, Yancey & Company to Latham & Company of the cotton in question, or of any other property purchased in whole or in part with the money of petitioners, be decreed invalid and void as to them;

(*d*) That it be decreed that Knight, Yancey & Company, and Lovell, trustee, held all such cotton, monies and credits in trust for their benefit, and that it be impressed with a lien to the amount of $98,005.58, and that the Court enforce the execution of said trust by Latham & Company and the American Surety Company, their surety, and by the receivers and trustee, out of the property in their hands;

(*e*) That they have such other relief as may be proper (Record, pp. 73 and 74.)

In other words, by this bill the petitioners sought to have all of the assets of the bankrupt estate of every kind, whether in the hands of the Trustee in bankruptcy or in the hands of third persons, declared to be a trust fund in their favor and impressed with a trust to the extent of their claim, superior to that of all other persons, and only incidentally asked that the cotton of Latham & Company be impressed with such trust by reason of the fact that it was, according to their view, a part of the assets of the bankrupt estate.

Brief Statement of the Case Made by the Amended Bill in the Pensacola Case.

In all substantial facts alleged, the amended bill in this case (Record, pp. 1–19) is the same as in No. 98, the Mobile case, except that the appellants do not attempt

to impress the whole of the bankrupt estate with their lien, but only a substantial part thereof, but do attempt thereby to impress property never in the custody of either of the Florida courts.

There is also a slight difference in the two suits in the allegations as to how Knight, Yancey & Company obtained the funds with which they purchased cotton. As will have been noted, in the Mobile case they claimed the money was obtained by discounting with the First National Bank of Decatur currency drafts drawn on Van Gerpen, while in the Pensacola case they allege that said firm obtained monies from the First National Bank of Decatur by overdrafts which afterwards they covered by deposit of said currency drafts. But for the purposes of the argument which will hereafter follow, these slight variations in allegations, it will be contended, make no difference in the application of the law or in the determination of the appellants' rights.

The bill prayed for a decree in substance as follows:

1. That Knight, Yancey & Company received and held certain remittance of money from New York, including the money of said complainants, aggregating the sum of $98,005.58, and held said money of said complainants in trust for their benefit, and held the entire remittances of which said monies were a part, subject to a trust or charge for the benefit of complainants to the extent of $98,005.58 with interest.

2. That Knight, Yancey & Company disbursed the monies of said complainants, and the entire fund of bank credit of which said monies became a part, in the purchase, and redemption of certain cotton, or the bills of lading therefor, and then held said cotton or said bills of lading subject to a trust or charge in favor of complainants to the extent of $98,005.58.

3. That Schedules 1 and 2, annexed to the bill, *include certain bales of cotton* which, or the bills of lading for which, were purchased or redeemed with the monies of said complainants.

4. That a trust or charge in favor of said complainants be impressed on the bond in lieu of the cotton set forth in Schedule 1, and on the proceeds of the cotton set forth in Schedule 2, to the extent that said cotton, or the bills of lading therefor, were purchased or redeemed with the monies of the complainants, or with the funds or bank credit of which said monies became a part.

5. That to the end that such trust or charge be enforced, Latham & Company and the American Surety Company be condemned to pay to the complainants the amount of said trust or charge on account of said bond.

6. That Lovell, as Trustee in Bankruptcy of Knight, Yancey & Co., and the First National Bank of Pensacola and the American National Bank of Pensacola pay to complainants out of the proceeds of the cotton set forth in Schedule 2 the amount of the trust or charge on account thereof.

7. That William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, has acquired or claims the cotton which, or the bills of lading for which, was or were purchased and redeemed with the monies of complainants, and with the fund or bank credit of which the monies of said complainants were a part.

8. That said Lovell render an account of the monies of complainants and set forth a full and true account of all and singular the cotton or other property that was purchased or redeemed therewith, and *all the cotton or other property that was redeemed with the fund or bank credit of which said monies were a part*, and that said account set forth the marks of the bales of cotton and what has become of the same, and the value of any part thereof set forth in Schedules 1 and 2.

Here, again, the appellants do not confine their relief to establishing a trust in certain specific bales of cotton in the custody of the Florida court, but seek to establish

it in a large part, if not all, of the bankrupt estate, to wit: "cotton or other property that was purchased or redeemed with the fund or bank credit of which said monies (of the appellants') were a part", and by reference to paragraph 11 of the bill (Record, p. 16) it will appear that this claim extends to all the assets of the bankrupt estate.

It should, however, be noted by the Court that all three of these suits, so far as concerns the petitioners' and appellants' claims, grow out of one and the same transaction, whereby the appellants bought thirteen foreign bills of exchange to which were attached thirteen forged bills of lading, calling for thirteen hundred bales of cotton, and for which they paid the sum of $98,005.58; and the facts alleged in all three to sustain the relief prayed for are substantially the same, although the pleader endeavors to draw different conclusions from these facts in each case. And the fact that the appellants moved for a consolidation of these cases is evidence that they consider the facts substantially the same in all three, and that the same rules of law were applicable to all. In the circumstances, the court will not attempt to find fine differences in allegations of fact in these cases, and will consider them as stating a single cause of action.

Points Made by Respondents and Appellees.

As additional reasons to those given by the District Courts of Alabama and Florida and by the Circuit Court of Appeals, and as showing that said judgments were correct, we submit the following:

I.

The bills on their faces show that the monies used in the purchase of Latham & Company's cotton were not the monies of the petitioners.

II.

In so far as the bills attempt to charge a trust on the cotton of Latham & Company, they do not trace with sufficient certainty petitioner's money into that cotton to justify a Court in Equity in impressing same with a trust in their favor.

III.

The bills on their faces show that no equitable relief against Latham & Company can be granted, for the reason that the facts alleged show that the relief, if any, should be against the trustee in bankruptcy alone, and cannot be granted in this suit.

IV.

The District Court for the Southern District of Alabama and the District Court for the Northern District of Florida cannot entertain jurisdiction of appellants' bills nor grant the relief therein prayed for, inasmuch as by said bills the appellants sought to impress the entire bankruptcy estate in the one case, and a large part thereof in the other case with a trust in their favor, which could only be done in and by the court of bankruptcy, to wit: the District Court for the Northern District of Alabama.

Argument.

In the argument which follows we shall treat the bills in the Mobile and Pensacola cases as being substantially the same, and we shall contend that from whatever aspect the allegations of the bills are considered, no equity is shown in said bills against Latham & Company and the American Surety Company, and that being true, they should be dismissed as to all of the respondents.

We shall discuss, first, the allegations of the bills from the standpoint that their averments *affirmatively* show that the appellants' money was not used in purchasing the cotton, which is the subject matter of said suits; and then from the standpoint that the allegations of the bills show that the appellants are unable to say, with that degree of certainty which the law requires, that their monies, or any part thereof, went into this specific cotton; and then from the standpoint that even if the court could eke out of the allegations of the bills sufficient to say that the appellants' money, or any part thereof, did go into this cotton, yet, in such case, it *affirmatively* appears from the appellants' allegations that their money is still in the hands of the trustee, and they can have, in that event, no relief against the other appellees; and lastly, that as the bill sought to impress a trust on the entire bankrupt estate or substantial parts thereof, not in the custody of the courts *a qua*, and said courts connot entertain jurisdiction of said bills, nor grant the relief prayed for, and properly dismissed the same.

FIRST POINT.

The bills on their faces show that the monies used in the purchase of the cotton belonging to Latham & Company, the subject matter of said suits, were not the monies of the appellants.

For the purposes of the argument of this point, we shall restate, in brief form, the essential *affirmative* allegations made by the appellants in their amended bills which we contend show on the faces of the bills that it was not the appellants' monies that were used in the purchase of the cotton involved in these suits.

For this purpose we shall state the allegations of the bill in the Mobile case, noting any material difference in the allegations in the Pensacola billl.

(1) Between April 5th and 18th, 1910, Knight, Yancey & Company caused to be issued and sent to New York for sale thirteen foreign bills of exchange, to which were attached thirteen fraudulent bills of lading purporting to evidence shipments of thirteen hundred bales of cotton to foreign ports. (Cross-bill, par. 9; Trans., p. 65.)

(2) The said thirteen foreign bills of exchange and said thirteen forged bills of lading were delivered by Knight, Yancey & Company to the First National Bank of Decatur for the purpose of having same forwarded by that bank to a broker in New York for sale to the plaintiff or some other banker. (Cross-bill, par. 11; Trans., p. 66.)

(3) Said drafts were so forwarded to one Van Gerpen, a broker in New York. (Cross-bill, par. 9; Trans., p. 65.)

(4) At the same time said foreign bills of exchange and forged bills of lading were delivered for the purpose aforesaid by Knight, Yancey & Company to the First National Bank of Decatur, a domestic or currency draft was drawn by Knight, Yancey & Company on Van

Gerpen in New York, for the approximate aggregate amount of said foreign drafts. (Cross-bill, par. 12; Trans., p. 67.)

(5) Said domestic drafts on Van Gerpen were deposited in the First National Bank of Decatur to the account of Knight, Yancey & Company and the proceeds thereof were placed to the credit of Knight, Yancey & Company. (Cross-bill, par. 12, Trans., p. 67.)

NOTE: In the Pensacola case the allegation is that Knight, Yancey & Company deposited said currency drafts to cover previous overdrafts allowed them by said bank to enable them to buy the cotton.

(6) To insure the redemption of said domestic drafts on Van Gerpen in case of non-acceptance or non-payment, the First National Bank of Decatur took collateral other than said foreign bills of exchange and forged bills of lading, ample to protect them in such event. (Cross-bill, par. 12; Trans., p. 67.)

NOTE: In the Pensacola case the allegation is, in substance, that to insure the redemption of said domestic drafts, the First National Bank, in addition to other collateral, took said foreign bills of exchange and said forged bills of lading.

(7) Van Gerpen sold thirteen foreign bills of exchange, with said thirteen forged bills of lading attached, to the petitioners, and after receiving payment therefor from the petitioners, accepted and paid the domestic draft drawn on him by Knight, Yancey & Company out of the monies so received from the petitioners. (Cross-bill, par. 12; Trans., p. 67.)

(8) The proceeds of said thirteen foreign bills of exchange were accounted for and remitted to Knight, Yancey & Company by Van Gerpen after deducting his commission and payments, and were by them deposited, with other monies of their own, in the First National Bank of Decatur. (Cross-bill, par. 12; Trans., p. 67.)

(9) That the monies so obtained and so mingled with other monies of Knight, Yancey & Company were used

by them in the purchase of all or some of the cotton mentioned in the twenty-one schedules attached to the bill, which cotton was, at the filing of the suit, in the hands of Latham & Company, the Trustee in Bankruptcy, and the various other persons mentioned in the bill. (Cross-bill, par. 14; Trans., p. 68.)

All of the foregoing facts are contained in *affirmative* allegations made in the bills, and on this statement of facts we claim that it is clear that the funds *actually* used by Knight, Yancey & Company in the purchase of the cotton involved in these cases (assuming that any part of it was so purchased) were the funds of the First National Bank of Decatur, obtained by Knight, Yancey & Company by the discount or deposit of the domestic drafts of Van Gerpen, or by authorized overdrafts, and were not the funds of the complainants, and that the most that can be said is that the funds obtained from the complainants were used by the bank to reimburse itself for monies theretofore advanced to Knight, Yancey & Company, and by them used in the purchase of the cotton.

In this connection it should be noted:

(*a*) The proceeds of the domestic or currency drafts drawn by Knight, Yancey & Company on Van Gerpen were immediately placed to the credit of the account of Knight, Yancey & Company in the First National Bank of Decatur, and were then checked against by Knight, Yancey & Company to buy this cotton; or, if we take the allegations in the Pensacola case, these currency drafts were deposited by Knight, Yancey & Company with the bank to cover overdrafts previously made in the purchase of cotton;

(*b*) The thirteen foreign bills of exchange with the thirteen forged bills of lading attached, according to the allegations in the Mobile case, were not attached to the domestic draft of Van Gerpen as collateral or otherwise; on the contrary, that bill alleges that the bank took other collateral from Knight, Yancey & Company to secure the acceptance and payment by Van Gerpen of the domestic drafts drawn on him. In the Pensacola case it is alleged

that said foreign bills of exchange and forged bills of lading were a part of the collateral taken by the bank to secure the overdraft previously allowed to Knight, Yancey & Company by the bank;

(*c*) The foreign bills of exchange and the forged bills of lading attached according to the allegations of the Mobile bill, were deposited with the First National Bank of Decatur merely to be forwarded by it to Van Gerpen; the First National Bank of Decatur did not buy or discount these foreign bills of exchange or give Knight, Yancey & Company any credit therefor, or thereon, or have any interest therein or relation thereto other than as forwarding agents; the drafts discounted by the bank and upon which Knight, Yancey & Company obtained money to buy cotton were the domestic or currency drafts drawn on Van Gerpen, the acceptance and payment of which was secured by other collateral deposited with the bank by Knight, Yancey & Company. In the Pensacola case the allegation is made that said foreign bills of exchange and forged bills of lading were part of the collateral which the Decatur bank held;

(*d*) Had Van Gerpen refused to accept or pay the domestic drafts drawn on him by Knight, Yancey & Company and deposited or discounted with the First National Bank of Decatur, the First National Bank of Decatur would have had to look to the credit of Knight, Yancey & Company and the other collateral deposited by them with it as security for said domestic drafts;

(*e*) The fact that Van Gerpen used the proceeds of the sale of the foreign bills of exchange to obtain money whereby to pay the domestic drafts and whereby the First National Bank of Decatur was reimbursed for moneys loaned or advanced to Knight, Yancey & Company by overdraft or by discount of such domestic drafts, and with which they purchased the cotton, does not make the money appellants paid Van Gerpen the purchase money of such cotton. To illustrate: If I withdraw by overdraft from a bank $1,000, and with this money buy cotton or other property, which I deliver in payment of an

antecedent debt, and thereafter, to pay said overdraft I sell a fraudulent bill of lading to another for $1,000, and take these proceeds and pay my overdraft at the bank, it cannot be said that such other person's money was the purchase money of the cotton or other property so as to impress that property with a trust in his favor as against the person who received it;

(*f*) The money paid by appellants to Van Gerpen and used by him to pay the domestic drafts for account of the First National Bank of Decatur did not after such payment belong to Knight, Yancey & Company, but to the First National Bank of Decatur, and if such money had been lost in transit the loss would have been the bank's loss.

We think it is plain, therefore, that from the allegations of the bill it affirmatively appears that it was the money of the First National Bank of Decatur and not the money of the petitioners that was used to purchase the cotton involved in this suit.

In the case of *Jeffe* vs. *Weld*, in the State courts of New York, the petitioners made in that case exactly the same contentions by a bill of intervention (the counterpart in its allegations of their cross-bill in this case) that they are making here, and the Supreme Court of New York sustained the contention which we are now making.

> *Jeffe* vs. *Weld*, 132 N. Y. Supp. 505; affirmed by Appellate Division, 139 N. Y. Supp. 1101; affirmed by the Court of Appeals, 102 N. E. 1104.

The Appellate Division, in affirming the decree of the lower court dismissing the petitioners' bill of intervention, said:

> "It does not appear from the allegations of the amended complaint that the cotton which so came in the hands of the defendants was purchased with the plaintiff's money. In fact, it was purchased with money which had been on deposit to the credit of Steele, Miller & Company in their Mississippi banks. That money, or a part of it, had been credited by the banks by reason of the currency

> drafts deposited and which were afterwards paid by Van Gerpen with plaintiff's money. The deposit of the currency drafts was not made for collection, but for the purpose of being immediately credited to the account of Steele, Miller & Company, as in fact it was. * * * The amount thus credited was not the amount paid by the plaintiff, but it was the proceeds of the currency drafts, and for the acceptance and payment of which the banks had taken security from Steele, Miller & Company. The fact that the currency drafts were accepted and paid by Van Gerpen with monies fraudulently obtained from the plaintiffs by reason of other drafts and forged bills of lading, did not, for the reasons above given, enable them to have a trust impressed upon the cotton because the same had not been purchased with their money."

The petitioners in their brief, seeming to think that the question has some bearing here, attempt to avoid the force of this argument by suggesting that "this argument is based on the hypothesis that when the deposit of the currency draft of Knight, Yancey & Company on Van Gerpen was made, it operated as an outright purchase by the bank". In this respect, they entirely misconceive the point which we make.

It is perfectly immaterial in this case whether the bank or Knight, Yancey & Company had *legal title* to these currency drafts after they had been deposited in the bank to account of Knight, Yancey & Company and they had been credited with the proceeds thereof. The question is not one of *title*, but is, whose money was it that Knight, Yancey & Company drew out of the bank on the strength of the deposit of the currency drafts, and used in the purchase of cotton, the bank's or the petitioners'?

It is immaterial to the determination of this question whether the bank purchased the drafts and placed the purchase price to Knight, Yancey & Company's credit, and thereby became the legal owner of the drafts, or whether the bank merely accepted the drafts for collection, leaving Knight, Yancey & Company the legal owners. For the fact still remains that the bank did then and there *loan* or *advance* or *pay* Knight, Yancey & Com-

pany a certain sum of money on the strength of either the domestic drafts or the other collateral deposited specially by them to guarantee the payment of the drafts. It makes no difference which, so far as concerns the validity of our argument. And it was that particular money, so obtained by them from the bank as a loan, advance, or payment, whichever one may choose to call it, which the cross-bill alleges Knight, Yancey & Company used to pay for this cotton. That money was undoubtedly the bank's money. Nor is the situation altered by the fact that Knight, Yancey & Company, by an independent transaction of sale between them, represented by Van Gerpen, and the petitioners, thereafter obtained a sum of money which they used either to repay a loan or advance made to them by the bank on a different account, to wit: A currency draft on Van Gerpen, or that the bank reimbursed itself for the purchase price paid for the currency draft by receiving payment from Van Gerpen out of the monies obtained by him from petitioners.

Let us suppose this case: Knight, Yancey & Company deposited a currency draft on Van Gerpen with the bank and deposited certain stock as security thereto. The bank then placed to their credit the amount of the draft, which they immediately withdrew and used to buy cotton, which they delivered on contract to a third person. At the same time they delivered certain foreign bills of exchange, to which were attached certain bills of lading, to the bank, with instructions to forward same to Van Gerpen. The bank's function with reference to these foreign bills was merely that of forwarding agent. It had no other relation towards these documents, nor any interest in them. Van Gerpen received the foreign bills and sold them to petitioners; received from them the money; but instead of paying the currency draft misappropriated the money, or otherwise misapplied it, and the currency draft was returned unpaid. Whose money is it, which was previovsly drawn out of the bank and used to buy the cotton that was lost, if Knight, Yancey & Company and their collateral failed to make good? Unquestionably, the bank's.

The cases cited by petitioners have no bearing on the

question here presented. The cases of *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442, and *Beale* v. *City*, 50 Fed. 647, and the other cases cited, involve merely the question of *title or ownership as between the bank and the depositor* of a draft deposited in the ordinary course of business without any special understanding or agreement as to whether it was purchased by the bank or taken by it for collection. In all of these cases, the banks had not paid or advanced the depositor anything on account of the draft deposited, and in none of them was the question, whether or not monies paid, advanced, loaned or credited an account of the drafts were the bank's money in any way involved, and these cases, we submit, are not authority in the instant case.

SECOND POINT.

The bills do not trace with legal certainty appellants' money into the Latham cotton so as to justify a court of equity in impressing same with a trust in their favor.

In order to subject specific property, and especially specific property in the possession of a third person, to a trust in their favor, petitioners must trace definitely and certainly the trust funds into the specific property sought to be charged. A mere inference or suggestion on their part that their money was so used is not sufficient, and vague and general allegations that their money was used in the purchase of either the cotton claimed by Latham & Company, or that claimed by Westphalen & Company (who were not parties to the suit), or that claimed by the other persons mentioned (who are not parties to the suit) or that found in the hands of the trustee when bankruptcy was declared, and which showed that the petitioners cannot, with that certainty required by the law, point out the specific property purchased with their money, do not state a cause of action.

The authorities to this effect are so numerous and so unanimous that we content ourselves with a citation of some of the most apposite.

Litchfield v. *Ballou*, 114 U. S. at 195.
Randolph vs. *Allen*, 73 Fed. 39-40.
Ferris v. *VanVechten*, 73 N. Y. 113.
Phillips v. *Overfield*, 13 S. W. 705.
Ober v. *Cochran*, 45 S. E. 384.
Parker v. *Jones*, 67 Ala. 234.
Ardis v. *Smith*, 52 Ga. 102.
Oliver v. *Platt*, 3 How. 401-402.
Peters v. *Blaine*, 133 U. S. 670.
Metropolitan Bank v. *Campbell*, 77 Fed. 705.
Empire v. *Carroll*, 194 Fed. 604.
Jeffe v. *Weld*, 132 N. Y. Supl. 505; and 39 Cyc. 530, 551.

An examination of the allegations of the bill shows on its face that the petitioners cannot trace their money with the required certainty into the Latham cotton. A reading of the 14th, 15th, 16th and 17th paragraphs of their amended cross-bill (Trans., pp. 68-70) in the Mobile case will show their utter uncertainty as to whether their monies were used in the purchase of the Latham cotton in Mobile, or the Latham cotton in Pensacola, or the Westphalen cotton in Pensacola, or the Ingelfingen cotton in New Orleans, or the large amount of cotton that came into the trustee's hands from the possession of the bankrupts, or whether it formed a part of the monies deposited by Knight, Yancey & Company with a dozen or more banks or brokers or formed a part of the monies that were found in possession of the bankrupts at the time of their bankruptcy. And, finally, having designated every bale of cotton purchased by Knight, Yancey & Company after April 5, 1910, every bank or broker's credit opened by them after that date, and every payment made by them as having been purchased or made out of their monies, all of which property they described in twenty-one (21) schedules covering twenty-six (26) pages of the

printed transcript, they conclude the 20th paragraph of their cross-bill with the statement:

> "The schedules hereto annexed are made part hereof, but they are not exclusive, and your orators, Knauth, Nachod & Kuhne, will ask leave to follow their money into any assets that may have come into the hands of the receivers or trustee. They also submit that any assets in the hands of the trustee should be applied to the reimbursement of their $98,005.58, first of all, whether their money be traced into the same or not."

So with reference to the bill in the Pensacola case. The Court will look in vain for any allegation which would justify them in saying that the appellants have pointed out specific property into which their money went, and when the allegations in this bill are taken in connection with those in the Mobile case and w[illegible]hose in the Westphalen case, it is perfectly obvious [illegible]e appellants have not the faintest notion into wha[illegible] property their money went.

This is the same bill conc[illegible]the New York Court of Appeals, in the ca[illegible] v. *Weld*, 102 N. E. 1104, *sustaining the point v[illegible]ow make*, made these observations:

> "There can be no doubt of the rule that funds obtained by fraud may be followed through however many transmutations of form they may have passed, so long as the rights of a third party for value and in good faith do not intervene; but this complaint, though prolix to a degree not easy to characterize, is so replete with hypothetical and alternative allegations that it is not possible on any reasonable interpretation to spell out any direct allegation that the money obtained from these plaintiffs did in fact pass into the cotton upon which it is sought to impress a trust."

THIRD POINT.

The bills on their faces show that no equitable relief against these respondents could be granted for the reason that the facts affirmatively alleged show that the relief, if any, should be against the Trustee in Bankruptcy alone and could not be granted in this suit.

We base our contention on this point upon the well-settled principle that when trust funds have been *mingled* with the private funds of a trustee and payments have been made out of such mingled funds, the presumption is that the trustee paid out of his own private funds, if sufficient funds are found in his hands to satisfy the trust funds.

Gorman v. *Littlefield*, 229 U. S. 19.
Empire v. *Carroll*, 194 Fed. 604–605.
39 Cyc. and authorities there cited.
3rd Pomeroy, Eq. Jurisprudence, Sec. 1049, pages 2021–2022.

The rule is thus stated by Pomeroy:

> "When trust money has been mingled with other funds, and the trustee has subsequently withdrawn a portion, it is presumed by the Court that he has withdrawn his own money and left the trust fund; and therefore it is only necessary to show that an amount has remained on deposit that is equal to the amount of the trust fund."

If, therefore, the bills show by their affirmative allegations, that there are in the hands of Knight, Yancey & Company, or in the hands of their trustee in bankruptcy, of these alleged mingled funds or of cotton, sufficient to satisfy the claims of the petitioners, then the presumption is that the funds or property so remaining in the hands of Knight, Yancey & Company, or their trustee in bankruptcy, are the funds or property of the petitioners.

Especially will this presumption be invoked in behalf of a third person, because it is a well-settled principle that a third person should not be disturbed where the trustee or his representative is able to respond, or where the *cestui qui trust* can obtain relief without disturbing the rights of such third person.

Crutchfield vs. *Haynes*, 14 Ala. 49.
Litchfield v. *Ballou*, 114 U. S. 195.

An examination of the schedules attached to the appellants' amended cross-bill in the Mobile case shows that there are in the hands of the Trustee in bankruptcy both cotton and monies claimed by them to be a part of the trust fund for their benefit sufficient times many over to satisfy their claims.

The following cotton is alleged by that bill to be in the hands of the Trustee and to constitute the cotton or a part thereof, purchased with the appellants' money, to wit:

Schedule 7	965 Bales.
Schedule 9	1,998 Bales.
Schedule 10	306 Bales.
Schedule 21	4,336 Bales.
Total	7,064 Bales.

Schedule 17 (Monies, etc.)	$23,612.06
Schedule 18 (Monies, etc.)	79,352.16
Total monies now held by Trustee.	$102,964.22

In other words, the trustee has remaining in his hands, out of the alleged trust fund, more than six times the number of bales of cotton claimed by the petitioners to be due them, and an amount of cash in excess of their disbursements.

In these circumstances, we submit that a court of equity will not decree a trust against property in the possession of a third person, when it affirmatively appears that a sufficient amount of the trust funds remains in the hands of the trustee to satisfy his claim.

FOURTH POINT.

The District Court for the Southern District of Alabama and the District Court for the Northern District of Florida could not entertain jurisdiction of the appellants' bills nor grant the relief therein prayed for, inasmuch as by such bills the appellants sought to impress the entire bankrupt estate in the one case, and a large part thereof in the other case with a trust in their favor, which could only be done in and by the court of bankruptcy, to wit., the District Court of the Northern District of Alabama.

It seems to us perfectly obvious, from a reading of the bills in these cases, that the theory of the plaintiff is that whereas $98,000 of their money, illegally obtained, was mingled with other funds of the bankrupt, evidently amounting to large sums of money, the whole of the funds of Knight, Yancey & Company passing through the First National Bank from April 5th to April 20th became a trust fund for their benefit, and that all of the cotton purchased by said firm between said dates became impressed with a trust in their favor, superior to and exclusive of the rights of all other persons. The property represented by this mingled fund constitutes the bankrupt estate, and the relief prayed for by the bills is that this estate be charged with a lien in their favor. It further appears from the bills that only a very small part of the fund sought to be reached could, by any stretch of the imagination, be said to be in the custody of the courts *a qua*. The balance of it is in the hands of the Trustee in Bankruptcy appointed by the District Court of the Northern District of Alabama, or in the hands of persons without the jurisdiction of those courts.

It seems to us almost too plain for argument that if the appellants are entitled to impress the bankruptcy

estate with a lien in their favor, they must seek that relief in the court which is administering that estate, and the courts below properly declined to take jurisdiction of a bill seeking such relief, and properly, in the circumstances, referred the appellants to the Bankruptcy Court.

In conclusion, we wish to call the Court's attention to the fact that these appellants have already had ample opportunity to amend their bills to state a case, and have endeavored to do so; that it is perfectly patent from the amended bills which they have already filed it is utterly impossible for them to state a case against these appellees, and that it would be a waste of time and would be productive of great delays and expense to further retain said bills in the Courts.

We respectfully submit that the judgments below should be affirmed, at appellants' cost.

WALKER B. SPENCER,
CHARLES PAYNE FENNER,
for Latham & Company and
American Surety Co.

Supreme Court of the United States,

OCTOBER TERM, 1916.

KNAUTH, NACHOD & KUHNE, *Petitioners,* *against* LATHAM & COMPANY and others, *Respondents.*	No. 98.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* WILLIAM S. LOVELL as Custodian etc. and as Trustee etc. and others, *Appellees.*	No. 259.
MAX JAFFE and others composing the firm of KNAUTH, NACHOD & KUHNE, *Appellants,* *against* MAURICE E. A. WESTPHALEN and others, *Appellee.*	No. 260.

REPLY FOR PETITIONERS AND APPELLANTS.

Counsel for petitioners-Appellants have not seen the briefs for respondents-Appellees. The order of November 13, 1916, seems to require, however, that any reply be submitted with the answering briefs of the respondents-appellees on or before November 20, 1916.

The principal brief for the petitioners-appellants presents almost exclusively points pertaining to the question of jurisdiction, because that was the only question passed on by the courts below; and, if the bills of complaint be held defective, an opportunity to amend them should be accorded.

> "No * * * proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; * * * and such court shall amend every such defect and want of form * * *; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> *§954, U. S. R. S.*

> "The court may at any time * * * permit any * * * pleading or record to be amended. * * * The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

> "The plaintiff may, as of course, amend his bill before the defendant has responded thereto" * * *
>
> *Rules 19, 28, Equity Rules.*

The only answer that has been filed is that of the appellee Trustee in the Westphalen & Company suit at Pensacola.

The doctrine that the bankruptcy proceedings in the Northern District of Alabama *ipso facto* vested the bankruptcy court with the custody and an exclusive jurisdiction over the property in question, although it was held adversely by Latham & Company and Westphalen & Company, was not contended for by counsel in the Circuit Court of Appeals and we understand that it will not be seriously advocated in this Court.

The Trustee contended in the Circuit Court of Appeals: (1) that, because the claim of Knauth, Nachod & Kuhne was prior and paramount and not subject to or in any way dependent on his interest or that of the adverse holders, they had no right to intervene, although unknown claimants were im-

pleaded, and the District Court had no jurisdiction to hear and enforce their rights; and (2) that their bill was multifarious and tended to reduce the litigation to chaos. By multifarious he could only mean that the same claim was presented as to different lots of cotton. As a corollary to his contentions, he concluded that Knauth, Nachod & Kuhne could have attached the property in question, regardless of the fact that his suit was for the delivery thereof and regardless of the fact that the Court held the proceeds thereof or forthcoming bonds therefor. Latham & Company, on the other hand, contended for the view that the bill of Knauth, Nachod & Kuhne was without equity and based this contention: (1) on the theory that the property in question was bought by the bankrupts with their own money, before the money of Knauth, Nachod & Kuhne was received; (2) on the theory that Knauth, Nachod & Kuhne had not traced their money into the property in question; and (3) on the theory that enough property remained in the hands of the Trustee and, therefore, Knauth, Nachod & Kuhne could not reclaim property that had been transferred to Latham & Company.

Assuming that the same contentions will be urged upon this Court, the following points may assist the Court in reaching its conclusions:

POINT I.

There is a broad distinction between a pure cross-bill, in a suit *in personam*, and a cross-bill or whatever it should be called by which a pursuing owner presents a prior and paramount right to property that has been impounded and sequestered by a court of equity.

It is submitted that the cases on which the respondent Trustee relies have no application to the cross-bill of a pursuing owner. Names are not things and definitions are not the things defined. Any precedent as to cross-bills applies only to the kind considered.

POINT II.

The remedy, if a bill contain too much, is not a motion to dismiss but a motion to strike out redundant matter or for a better statement of claim. The remedy, if the original and cross-suits in this instance could not be conveniently tried together, would be an order for separate trials. But it is clear that there should be but one judgment and no good reason appears for separate trials.

Rules 20, 21, 26, Equity Rules.

Unknown claimants were impleaded. Knauth, Nachod & Kuhne were permitted to intervene. The Trustee seeks to recover the property in question. Knauth, Nachod & Kuhne seek to impress it with a trust or charge for their benefit, to the extent that it represents their money. To that extent they controvert the Trustee's right to recover it at all. They are pursuing owners and demand their own property and submit that they are entitled to recover it and that the Trustee has no right to it and the bankruptcy court no right to administer it. On the other hand, Latham & Company should not be required to produce it and surrender it to two different claimants in separate suits. The Trustee will make out a case, if at all, by showing that a preference has resulted and that there were reasonable grounds to believe that a preference would result. Knauth, Nachod & Kuhne will make out a prior and paramount right by showing that the bankrupts held their money as trustees *ex maleficio* and utilized the same in the purchase and redemption of certain parts of the property in question. If Latham & Company are unable to meet the proof of Knauth, Nachod & Kuhne, the property will be awarded to them, to the extent of their claim, and will not pass through the hands of the Trustee. If Latham & Company succeed as against the Trustee, the balance will be awarded to them and never pass through the hands of

the Trustee. Is it not clear that there should be but one judgment, awarding the property to the rightful claimant?

Is it not clear also that Knauth, Nachod & Kuhne could not have proceeded in a state court to attach the property while it was in litigation? Latham & Company could not be deprived of the right to produce it in discharge of their forth-coming bond; or be compelled to surrender it to two different claimants. The Trustee could not be deprived of his right to a delivery of the property or its proceeds, in advance of a determination of the rights of the respective claimants.

POINT III.

The points made on behalf of Latham & Company proceed on a wrong view of the facts admitted by the motions to dismiss and of their remedies, in case of uncertain allegations, to wit:

1. Certain parts of the property in question were purchased and redeemed with the money of Knauth, Nachod & Kuhne after it was received by the bankrupts, not with money previously advanced by their local banks, as assumed on behalf of Latham & Company. (*A quotation from the bill at Mobile is printed, together with a reference to the pages of the Transcript, at page 11 of the principal brief for Knauth, Nachod & Kuhne; Transcript in No. 259, fols. 37–39, 42–46.*)

2. The allegations of the bills of Knauth, Nachod & Kuhne referred to above are definite and certain but, if not, the remedy is a motion for a further and better statement and not a motion to dismiss. (*Rule 20, Eq. Rules.*)

3. Knauth, Nachod & Kuhne have the right to follow their money into the property in question, whether the Trustee holds enough property to satisfy their claim or not. The bills do not allege that all the property in question was purchased or redeemed with their money, only certain parts of it. If Latham & Company claim that

there should be an accounting for all property purchased with the trust fund and the same applied to the claim of Knauth, Nachod & Kuhne in the inverse order of alienation, on the theory that the bankrupts transferred their own cotton first, their remedy is to allege the facts relied upon and ask for that relief.

4. It is a novel proposition that a bill should be dismissed because the pleader asks for too much or too little or the wrong relief. The remedy is to ask that only the proper relief be granted. If there be any reason for it, the scope of the bill can be reduced in advance. (*Rule 21, Eq. Rules.*)

The case of *Jaffe* vs. *Weld* (132 N. Y. Supp. 505 and 155 N. Y. App. Div. 110; 139 N. Y. Supp. 1101. Aff'd on other grounds, 208 N. Y. 593; 102 N. E. Rep. 1104) has no application to the suit at bar. At Special Term and at Appellate Division that case proceeded expressly and exclusively upon the doctrine that the deposit of a draft in a bank is presumptively an outright sale thereof to the bank, in the absence of an agreement to the contrary. If there be any such presumption under the law of New York, which we doubt, it is contrary to the presumption which obtains generally throughout the country. (*See cases cited on page 32 of principal brief for Knauth, Nachod & Kuhne.*) The Court of Appeals declined to follow that doctrine but placed its determination upon the doctrine that the hypothetical and alternative allegations in the complaint rendered it demurrable. There are no hypothetical or alternative allegations in the bills before the Court. In that case the complaint has been amended and the amended complaint has been sustained. (*N. Y. Law Journal, July 5, 1916. page 1266.*)

If this Court consider the question of pleading urged on behalf of Latham & Company, that the bills should be more definite and certain, the following cases are submitted:

Hooley vs. *Gieve, 9 Daly, 104, 110, 112–113, 114–115.* (Gen'l Term, N. Y. Com. Pleas, 1879.) Approved and affirmed, *82 N. Y. 625; 9 Abb. N. C. 8, 40, 41.*

Lafort vs. *Carpenter*, *91 Hun 76*, *80-81*. Aff'd on opinion below, *154 N. Y. 757*.

Smith vs. *Township of Au Gres, Mich.*, *150 Fed. Rep. 257*, *260-261*; *80 C. C. A. 145*.

Westinghouse Electric M'f'g Co. vs. *Wagner Electric and M'f'g Co.*, *225 U. S. 604*, *618*, *619*, *620*, *621-622*, *622*.

Respectfully submitted November 17, 1916.

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NOV 13 19
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Supreme Court of the United States.

OCTOBER TERM, 1916.

KNAUTH, NACHOD & KUHNE,
Petitioners,
against
LATHAM & COMPANY AND OTHERS,
Respondents.
No. 98.

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
Appellants,
against
WILLIAM S. LOVELL AS CUSTODIAN ETC. AND AS TRUSTEE ETC. AND OTHERS,
Appellees.
No. 259.

MAX JAFFE AND OTHERS COMPOSING THE FIRM OF KNAUTH, NACHOD & KUHNE,
Appellants,
against
MAURICE E. A. WESTPHALEN AND OTHERS,
Appellees.
No. 260.

BRIEF FOR PETITIONERS AND APPELLANTS.

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The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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and as modified affirmed a decree of the United States District Court for the Southern District of Alabama, the same having been granted on motion and entered in the office of the Clerk of said Court on January 24, 1914. The decree of said District Court had dismissed the bill of the petitioners, in the nature of a cross-bill or otherwise, for want of jurisdiction. It was modified merely so as to show that said dismissal was without prejudice. (*Transcript of Record in No. 98, pp. 124-125, 125-126, 140, 146.*)

The second and third cases above are appeals from decrees of the United States District Court for the Northern District of Florida dismissing bills of the appellants, for want of jurisdiction. In making said decrees, the Court felt constrained to reverse its former rulings, on denying motions to quash service and to dismiss the original bills, and to follow said decision of said Circuit Court of Appeals. (*Transcript of Record in No. 259, fols. 103, 112; Transcript of Record in No. 260, fols. 101, 108.*) By an order entered February 21, 1916, this Court directed that said appeals be heard with said *certiorari*, as one case.

References are made to the *pages* of the printed transcript in the first above case and to the *folios* of the second and third.

STATEMENT, RULE 21, ¶ 2, SUB. (1).

1910.

April 29. The respondents, the Receivers in Bankruptcy of Knight, Yancey & Company, together with a creditor of said firm, "for himself and all other creditors who may become or make themselves parties to this proceeding", filed their bill in equity in the United States Circuit Court for the Southern District of Alabama against the respondents Latham & Company and the bankrupts and certain carriers. Said suit was brought to impound and sequester, by writs of injunction and sequestration, some 7800 bales of

cotton; also to set aside the transfer thereof by said bankrupts to said Latham & Company, as a voidable preference; and also to require said defendants "to deliver said cotton to your orators", said Receivers and creditor. Said suit was instituted pursuant to an order of the bankruptcy court for the Northern District of Alabama, by which court the adjudication of bankruptcy had been made and said Receivers had been appointed. Said Receivers had attempted to institute an ancillary bankruptcy proceeding in the United States District Court for the Southern District of Alabama, for the purpose of impounding said property and requiring the delivery thereof to them, but that was before the Act of June 25, 1910, authorized ancillary proceedings in bankruptcy, by adding clause 20 to § 2 of the Bankruptcy Act (39 St. at L. 839), and before the effect of the decision in Babbitt *vs.* Dutcher (216 U. S. 102, 114–115) was well understood and, therefore, their application had been denied. (*Transcript in No. 98, pp. 7, 8, 16, 39.*)

May 4-9. Pursuant to an order of said Court and a writ of sequestration in said suit, the Marshal took possession of 4200 bales of said cotton. (*Transcript in No. 98, pp. 17–21.*)

May 5. Said Receivers and creditor obtained an order amending their bill and the prayer thereof as follows:

NEW ALLEGATIONS.

"4½. Your orators are informed and believe and on such information and belief charge that there are persons other than said Latham & Company who claim some right, title or interest in said seventy-eight hundred (7800) bales of cotton, or portions thereof, and that the names of such other persons, firms or corporations are unknown to these complainants; and that the nature of any such right, title or interest claimed in and to said seventy-eight hundred (7800) bales of cotton is unknown to these complainants." (*Transcript in No. 98, pp. 22–23.*)

NEW PRAYER.

"That all persons, firms or corporations who claim any right, title or interest in and to said seventy-eight hundred (7800) bales of cotton be

made parties defendents to this bill and be cited by publication to answer this bill." (*Transcript in No. 98, 23.*)

May 14. Said Circuit Court permitted the respondents Latham & Company to substitute a forthcoming bond for the cotton that had been sequestered, the condition being that they shall "deliver within sixty days from date of any final decree of this court said cotton to the proper officer of the court, or shall pay and satisfy such decree as may be rendered in the premises." The respondent, American Surety Company of New York, is the surety on said bond. (*Transcript in No. 98, pp. 27–29.*)

July 1. The petitioners Knauth, Nachod & Kuhne, being thus called upon to do so, filed their answer to said bill of said Receivers and creditor and their cross-bill or whatever it should be called. Said cross-bill was filed pursuant to the following decree of said Circuit Court:

> "That the defendants Knauth, Nachod & Kuhne (impleaded as unknown persons by the amendment allowed to the bill of complaint by the order entered herein on the 5th day of May, 1910) be and they hereby are granted leave to file their cross-bill in this cause; and that the same be filed and process issued according to the prayer thereof." (*Transcript in No. 98, p. 35.*)

No motion to vacate said order or any objection to the entry thereof has ever been made and the same remained in force when the cross-bill was dismissed by the decree under review. A further order was thereafter made, directing substituted service of *alias subpœnæ ad respondendum.* (*Transcript in No. 98, pp. 37–38.*)

August 20. The respondent Trustee was substituted as sole complainant in place of said Receivers and creditor and filed a supplemental bill, said Circuit Court holding that said Receivers were "not necessary or proper parties" but sustaining the suit in the right of said creditor who, it should be borne in mind, had sued "for himself and all other creditors who may

become or make themselves parties to this proceeding." (*Transcript in No. 98, pp. 39, 42, 44-49; Frost et al.* vs. *Latham & Co. et al., 181 Fed. Rep. 866, 867-868, 870.*)

September 5. Said Receivers and creditor and Trustee, professing to appear specially, moved to dismiss said cross-bill of Knauth, Nachod & Kuhne, for want of jurisdiction of "subject matter"; and said Trustee also moved to strike out the answer of said Knauth, Nachod & Kuhne on the ground that they had no right to answer. Ten days later the respondents Latham & Company and American Surety Company of New York demurred to said cross-bill of Knauth, Nachod & Kuhne on the ground that there was both a want of jurisdiction and a want of equity. (*Transcript in No. 98, pp. 49, 50, 51-52, 53-54.*)

It should be noted that said motions and demurrers present the question whether said respondents, by attacking the jurisdiction of the subject matter of said cross-bill and the merits thereof instead of merely moving to quash service or to vacate the order under which it was filed, did not *ipso facto* appear generally and submit themselves to the jurisdiction of said Circuit Court, provided that said court in any district would have had jurisdiction.

December 20. The Petitioners Knauth, Nachod & Kuhne were permitted by a decree of said Circuit Court to file the amended cross-bill before the Court, or whatever it should be called, in place of the original cross-bill. (*Transcript in No. 98, p. 60.*) The claim of Knauth, Nachod & Kuhne is, in substance, that parts of the cotton in question equitably belong to them and that their right to the same is both prior and paramount to any interest of the respondents. (*Transcript in No. 98, pp. 64, 65, 67, 68, 69, 71; Schedules 5, 6 and 7, pp. 82, 83, 86.*)

No motion to vacate said decree has ever been made and the same remained in force when said amended cross-bill was dismissed by the decree under review.

1911

March 21. Said Circuit Court granted a decree striking out the answer and cross-bill and amended cross-bill

of Knauth, Nachod & Kuhne, for want of jurisdiction, on motion of the respondent Trustee who again professed to appear specially but nevertheless moved for said decree on the ground that there was both a want of jurisdiction and a want of equity. (*Transcript in No. 98, pp. 98-100, 102-103, 104; Lovell* vs. *Latham & Co. et al., 186 Fed. Rep. 602, 602-603.*)

It should be noted that in its opinion said Circuit Court indicated that the only remedy of Knauth, Nachod & Kuhne was to wait until the respondent Trustee had recovered judgment and collected it and then present a claim to the bankruptcy court. This presented the question whether Knauth, Nachod & Kuhne, as pursuing owners, were barred or hindered and delayed from presenting a prior and paramount right to certain parts of the property in question because it had been impounded and sequestered by a court of equity, at the suit of parties whose rights, if any, were subsequent and inferior to their own. Said court held that because the rights of Knauth, Nachod & Kuhne were prior and paramount—" new and distinct * * * not auxiliary to or a dependency upon this suit and not essentially connected with the original bill therein "—it had no jurisdiction. It decided the question on the merits without reference to the fact that it was presented by motion instead of demurrer, except that leave to amend was not granted.

The above is not the decree under review. It was reversed, as hereafter set forth, and is mentioned because said question has been carried over to the decree that is under review.

1912

January 1. The United States District Courts succeeded the Circuit Courts for each district respectively.

December 3. Said decree, striking out the answer and cross-bills of Knauth, Nachod & Kuhne, was reversed by the United States Circuit Court of Appeals for the Fifth Circuit.

"The amended cross-bill sets up that Knight, Yancey & Co. obtained from the appellants $98,-

005.58 by means of forged bills of lading, and that the money of which they were defrauded was invested in the assets involved in the suit. * * *

We are of the opinion that, under the circumstances which called the appellants into the case and, in view of the rights which they have asserted by leave of the court, their answer and cross-bill, or intervening petition, should not be summarily stricken from the files."

Knauth, Nachod & Kuhne vs. *Lovell, 200 Fed. Rep. 403, 404; 118 C. C. A. 555.*

1914.

January 24. The United States District Court for the Southern District of Alabama granted the decree, dismissing the cross-bill of Knauth, Nachod & Kuhne, which was modified and as modified affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, by the decree now under review. Said decree was granted on motions filed by the respondents. Knauth, Nachod & Kuhne had intended to amend their bill so as to allege merely the ultimate facts, as prescribed by the present Equity Rules, and so as to omit a claim to property in other districts which, because of technical objections in this suit, had been put in litigation elsewhere. But, shortly after the filing of the mandate of the Circuit Court of Appeals on the decision above quoted and before such amendment could be made and on January 31, 1913, the day before the present Equity Rules went into effect, the respondents filed demurrers on the ground that there was both a want of jurisdiction and a want of equity. Said demurrers were never brought to a hearing but the motions to dismiss were filed, on the same grounds. The decree itself recites that it is granted both for a want of jurisdiction and a want of equity but the opinion shows that a want of equity is predicated solely on a want of jurisdiction; and, of course, a want of jurisdiction precludes passing on the merits of a bill. (*Transcript in No. 98, Notices of Motion, pp. 109-112, 113-116, 117-120; Decree, pp. 125-126; Opinion, 124-125 and Lovell et. al.* vs. *Latham & Co. et al., 211 Fed. Rep. 374, 378-379.*)

It should be noted that in the motions on which said decree was granted the respondents do not even

profess a special appearance; and that the want of jurisdiction, according to the decision of the District Court, was that of a Federal court as such. That is to say, the decision proceeded on the theory that no United States District Court would have jurisdiction:

> "The cross-complainants are seeking to impress a trust upon certain cotton a part of which they allege their money purchased, and that they have a trust fund in that cotton. The cotton is in the possession of defendants Latham & Company, the title to which they claim under the transfer and delivery to them by Knight, Yancy & Co. Assuming that the cross-complainants have and can trace a trust fund into the said cotton, how must they proceed to establish their claim and to impress their trust upon said cotton? Manifestly by a suit against said Latham & Company, who have said cotton in their possession and claiming it as their property. Some of the cross-complainants are resident citizens of New York State and some of Germany while Latham & Company are resident citizens of France. How and where does this court acquire jurisdiction to try and determine the controversy between these parties? It certainly acquires no such jurisdiction under the Bankrupt Act; and the general law conferring jurisdiction on the ground of diverse citizenship of the parties to the litigation has no application to the case, in view of the facts shown in it. No jurisdiction of the litigation between the cross-complainants and the defendants Latham & Company has been acquired by the consent of said defendants. * * * this case, in substance and effect, is a suit by them against Latham & Company of which, in my opinion, this court has no jurisdiction, whether the attitude of the so-called cross complainants is that of cross complainants, or intervenors as they may be called.
>
> A motion to dismiss a bill for want of equity should be sustained if, admitting the facts apparent on the face of the bill, whether well or ill pleaded, the complainant can have no relief."
>
> *Transcript in No. 98, pp. 124-125; Lovell et. al. vs. Latham & Co. et al., 211 Fed. Rep. 374, 379.*

It should also be noted that the above is sharply at variance, as to the remedy of Knauth, Nachod & Kuhne, with the former decision to strike out their

answer and cross-bill; also that it presents the following questions: (1) whether any United States District Court has jurisdiction to enforce the rights of any pursuing owner of property that it has impounded and sequestered, in a suit in equity, unless there be a diversity of citizenship; (2) whether a sale of property that has been impounded and sequestered by a court of equity and a deposit of the proceeds in court or, what is the same thing, a substitution of a forthcoming bond therefor does not free the property or at least permit a pursuing owner to follow the proceeds thereof, in the possession of the court; and (3) whether, if any United States District Court would have had jurisdiction, the right to be sued in a particular district was not waived by a presentment of the merits of the bill and jurisdiction of the subject matter thereof.

1915

January 18. The United States Circuit Court of Appeals for the Fifth Circuit modified and as modified affirmed said decree dismissing the bill of Knauth, Nachod & Kuhne, by the decree now under review. The modification was merely so that the decree would show that the dismissal was without prejudice. (*Transcript in No. 98, p. 140.*) The ground of decision was that the proceedings in bankruptcy in the United States District Court for the Northern District of Alabama brought the property in question within its exclusive jurisdiction and

> "Hence the appellants had no place in the suit instituted by the trustee merely to set aside a preferential transfer. If as claimed they may impress a trust in their favor on any of the assets of the bankrupts in the hands of the trustee no reason is perceived why they may not proceed in the court of original jurisdiction. In any event they will not be permitted to intervene in an ancillary suit, brought by the trustee, the sole purpose of which is to collect assets of the bankrupt and transfer them to the proper court for administration."

Transcript in No. 98, pp. 139-140; Knauth, Nachod & Kuhne vs. *Latham & Co. et al., 219 Fed. Rep. 721, 722-723; 135 C. C. A. 419.*

It should be noted that the above reverts to the doctrine on which the answer and bill of Knauth, Nachod & Kuhne were first stricken out and, in effect, reverses the doctrine that no United States District Court would have jurisdiction of their claim, the doctrine on which their bill was dismissed.

It should also be noted that the above presents the following questions: (1) whether the property in question, which was held by Latham & Co. under a claim of right, came into the custody of the United States District Court for the Northern District of Alabama, when bankruptcy proceedings were instituted therein by Knight, Yancey & Company, or whether the conditions that made the transfer thereof voidable must be established and the transfer set aside before said property can come into the custody or the exclusive jurisdiction of said Court; (2) whether the bankruptcy court did not waive its exclusive jurisdiction, if ever acquired, by authorizing its Receivers to join with a creditor in the suit to impound and sequester the property in question; (3) whether, if any owner of property impounded and sequestered by a court of equity cannot present his claim to it, the fact that unknown claimants were impleaded in this case and called upon to present their claim did not authorize Knauth, Nachod & Kuhne to present their claim; (4) whether, by attacking the cross-bill of Knauth, Nachod & Kuhne both as to its merits and as to jurisdiction of the subject matter thereof, the respondents did not waive their right to be sued in any particular district, provided that any United States District Court would have had jurisdiction thereof; and (5) whether a United States District Court as such can follow the usual rule that when a court of equity impounds or sequesters property, it *ipso facto* acquires jurisdiction and assumes the duty to hear and enforce the rights of any claimant of the same.

February 22. A re-hearing by said Circuit Court of Appeals was denied. (*Transcript in No. 98, p. 143.*)

April 28. A writ of *certiorari* was granted by this Court. (*Transcript in No. 98, p. 146.*)

The nature of the claim of the petitioners, Knauth, Nachod & Kuhne, appears in the foregoing excerpts from the opinions of the courts below. The following parts of their bill is also submitted:

> "6. The seventy-eight hundred and eighty-two (7882) bales of cotton or property, mentioned in the bill of complaint in the original suit, or some parts thereof, had been paid for by the bankrupt firm of Knight, Yancey & Company with the proceeds of money belonging to your orators, the present complainants, the firm of Knauth, Nachod & Kuhne, and was subject to a charge in their favor and to that extent equitably belonged to said firm, as hereafter more fully set forth * * * after your orators Knauth, Nachod & Kuhne, * * * had delivered their money to said F. Van Gerpen * * * said foreign drafts were all accounted for and the proceeds thereof remitted to Knight, Yancey & Company and deposited by them, with other money, in the First National Bank of Decatur * * *. At the instance of Knight, Yancey & Company, by checks or acceptances or otherwise, the said bank credit or trust fund was expended * * * for certain cotton. * * * Parts of the cotton mentioned in all said Schedules 5 to 14 inclusive were paid for out of the money of Knauth, Nachod & Kuhne and out of the bank and other credits constituting the said trust fund held by the said bankrupts for their benefit." * * * Schedule 5 contains the 4,200 bales sequestered in this suit; and Schedules 6 and 7 contain the "Latham" cotton at Pensacola which was sought to be impounded by this suit at the time the appellants intervened.
>
> *Transcript in No. 98, pp. 64, 67, 69, 82.*

The appeals from decrees of the United States District Court for the Northern District of Florida involve substantially the same questions but they have arisen under a somewhat different course of litigation. The Receivers and creditor of Knight, Yancey & Company were granted ancillary proceedings in bankruptcy, whereas their application therefor had been refused in the Southern District of Alabama. Knauth, Nachod & Kuhne were not impleaded as unknown claimants in the original suits in that district and their application to intervene was denied but they were granted leave to file original bills on the

theory that, by impounding the cotton there in question, the Court acquired an ancillary jurisdiction and assumed the duty of hearing and enforcing the rights of all claimants. The following are the facts and circumstances:

1910.

May 11. The United States District Court for the Northern District of Florida, by an injunction order in an ancillary proceeding in bankruptcy, impounded the property there in question, the same being in the possession of the Louisville & Nashville Railroad Company. Subsequently the appellee Lovell as Trustee brought a plenary suit for the continuation of said injunction order and the recovery of the impounded cotton that was claimed by the appellees Latham & Company. On July 8, 1910, an order was made in said suit directing the delivery of said cotton to said Lovell as temporary custodian of said court. Said order provided that said custodian should permit said Latham & Company to substitute for a part of said cotton a forth-coming bond. Said bond was given with the appellee American Surety Company of New York as surety. Said order also provided that said custodian should sell the rest of said cotton and deposit the money in bank in Pensacola where it should remain to abide the final decree of the court. The property was sold and the deposit made. (*Transcript in No. 259, fols. 8–16.*)

July 1. The United States District Court for the Northern District of Florida denied the application of the appellees Westphalen & Company for the impounded cotton that was claimed by them but granted them leave to sue in the United States Circuit Court of that District to recover the same. Thereupon and about July 14, 1910, they brought suit in said Circuit Court against the appellee Lovell as Trustee and said railroad company to recover the same. Thereupon the parties to said suit entered into an agreement pursuant to which said property was delivered to said Lovell as Temporary Custodian thereof and by him sold and the proceeds deposited in bank at Pensacola

to abide the final decree of the court. (*Transcript in No. 260, fols. 6-14.*)

1914.

April 20. The appellants, Knauth, Nachod & Kuhne, filed their amended bills in said District Court for the Northern District of Florida, by leave of court. The Court had previously sustained its jurisdiction by denying motions to quash service. The claim of Knauth, Nachod & Kuhne is set forth in the form prescribed by the present Equity Rules, and as they had intended to amend their bill and set forth their claim to the property that was impounded and sequestered in the Southern District of Alabama, as before stated. It is in substance that part of the property in question in said Northern District of Florida equitably belongs to them. (*Transcript in No. 259, fols. 32-39, 42-43, 45, 47, 103; Transcript in No. 260, fols. 30-36, 38-43, 44-45, 101.*)

1915.

July 10. The United States District Court for the Northern District of Florida, on motions of the appellees, granted the decrees appealed from, dismissing the amended bills of Knauth, Nachod & Kuhne, for want of jurisdiction. The decrees set forth that the proper forum is the bankruptcy court of the Northern District of Alabama. The motions were made on the ground that there was a want of equity as well as a want of jurisdiction of the subject matter. The appellants had filed written objections to said motions on constitutional and other grounds. (*Transcript in No. 259, fols. 79, 83, 85-86, 91, 96-97, 105-106, 112; Transcript in No. 260, fols. 82, 85-87, 92, 95-97, 103-104, 108-109.*)

It is to be noted that said Court obviously felt constrained to follow said decision of said Circuit Court of Appeals and, although no opinion was written except what appears in the decrees, it so stated to counsel.

It should also be noted that said decrees involve the following questions: (1) Whether by impounding the property in question the court below acquired juris-

diction to hear and enforce the rights of the appellants, Knauth, Nachod & Kuhne, or of any other pursuing owners; (2) whether, by presenting the merits of the appellants' bills and the jurisdiction of the court over the subject matter thereof, the appellees did not waive their right to be sued in a particular district; (3) whether the Bankruptcy Act vests the bankruptcy court with exclusive jurisdiction of the claim of the appellants or any pursuing owners when their property has been impounded in the hands of adverse holders by another court in another district and state; and (4) whether the court below, by impounding the property of the appellants and then dismissing their claim of a prior and paramount ownership without a hearing, did not deprive them of their property without due process of law, contrary to Amendment V of the Constitution of the United States.

July 10. The court below allowed appeals to this Court, on the ground that the foregoing questions were involved, pursuant to § 238 of the Judicial Code. (*Transcript in No. 259, fols. 123, 125; Transcript in No. 260, fols. 117, 119.*)

SPECIFICATION OF ERRORS, RULE 21, ¶ 2, SUB. (2).

First. The United States Circuit Court of Appeals for the Fifth Circuit erred in merely modifying and then affirming as modified the decree of the United States District Court for the Southern District of Alabama, instead of reversing the same, and in proceeding upon the theory: (1) that the original suit was merely to set aside a preferential transfer and recover a money judgment, whereas it was to recover specific property; (2) that the property in question was *in custodia legis* of the bankruptcy court in the Northern District of Alabama; (3) that *Lazarus* vs. *Prentice* (234 U. S. 263) is an authority that is applicable to this case; (4) that Knauth, Nachod & Kuhne had no place in the original suit, after they had been impleaded as unknown claimants; and (5) that they would not be permitted to intervene and set up the prior and paramount right of pursuing owners of property in the possession of a court of equity.

Second. The United States District Court for the Southern District of Alabama erred in dismissing the bill of Knauth, Nachod & Kuhne, for want of jurisdiction, and in proceeding on the theory: (1) that they could not intervene and set up the prior and paramount right of pursuing owners because such right is independent of the claim involved in the original suit; (2) that they were not parties to the original suit, after they had been impleaded as unknown claimants; (3) that their prior and paramount right as pursuing owners was not germane or pertinent to the claim of title and right of possession asserted by the Receivers and creditor and Trustee; (4) that their prior and paramount right as pursuing owners did not attach to the forthcoming bond, the proceeds of their property in possession of the court; (5) that no Federal court would have jurisdiction because it was not granted by the Bankruptcy Act or by the general law respecting parties of diverse citizenship; and (6) that no jurisdiction had been acquired, by the consent of Latham & Company.

Third. That the United States District Court for the Northern District of Florida erred in following said decision of said Circuit Court of Appeals, for the reasons above given.

The above errors are set forth more at length in the assignments in the records. (*Transcript in No. 98, pp. 126–130, 143–144; Transcript in No. 259, fols. 117–119; Transcript in No. 260, fols. 111–113.*)

POINT I.

The property in question is neither *in custodia legis* nor in any way within the jurisdiction of the United States District Court for the Northern District of Alabama, in Bankruptcy. It had been transferred to Latham & Company and Westphalen & Company, before the bankruptcy of Knight, Yancey & Company, and was held by carriers for them, under a claim of right, when it was impounded and sequestered by the courts at Mobile and Pensacola. Said transfers are not void but merely voidable and must be set aside on statutory grounds before said bankruptcy court will have any jurisdiction thereover. (*Transcript in No. 98, pp. 5, 47, 70-71; Transcript in No. 259, fols. 42-43; Transcript in No. 260, fols. 38-43.*)

It has been determined that the Trustee in Bankruptcy of Knight, Yancey & Company stands in their shoes and, as such Trustee, has no right to the property until said transfers be set aside on statutory grounds; and also that the burden rests on the Trustee of establishing the conditions that make them voidable.

Pyle, Trustee, vs. *Tex. T. & T. Co., 238 U. S. 90, 97-98.*

Lovell, Trustee, vs. *Newman, 227 U. S. 412, 421-422, 426.*

Lovell, Trustee, vs. *Newman, 192 Fed. Rep. 753, 761; 113 C. C. A. 39. Certiorari denied and appeal dismissed, 227 U. S. 412, 414, 426.*

Hentz vs. *Lovell, Trustee, 192 Fed. Rep. 762; 113 C. C. A. 48. Appeal dismissed, 231 U. S. 738.*

The jurisdiction of the bankruptcy court depends on its jurisdiction over Knight, Yancey & Company. By its officer, the Trustee, it succeeded to their possession and right of possession. Its jurisdiction does not extend to property held adversely, particularly property held under transfers that are merely voidable, at most. The test is possession or right of possession. Jurisdiction of property held adversely must be acquired by consent or plenary suit, even where the property is within the district.

Bankruptcy Act, §§ 60b, 70a (5).

In re Rathman, 183 Fed. Rep. 913, 927; 106 C. C. A. 253. Cited in Jones vs. *Springer, 226 U. S. 148, 155.*

In re Gill, 190 Fed. Rep. 726, 728; 111 C. C. A. 454.

Jaquith vs. *Rowley, 188 U. S. 620, 623-624, 625-626.*

First Nat. Bank vs. *Chicago Title & Trust Co., 198 U. S. 280, 289, 290, 290-291, 292.*

Babbitt vs. *Dutcher, 216 U. S. 102, 113.*

Hebert vs. *Crawford, 228 U. S. 204, 208-210; and cases cited.*

The right to avoid preferences on statutory grounds is in derogation of the common law right of tranferees, in commercial transactions, and is not to be extended beyond the clear import of its terms.

Fitzgerald vs. *Quann, 109 N. Y. 441, 445.*

Thompkins vs. *Hunter, 149 N. Y. 117, 123.*

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."
>
> *Shaw* vs. *Railroad Co., 101 U. S. 557, 565.*

By the provisions of the Bankruptcy Act above cited, the judgment or decree of a court of competent jurisdiction is necessary to deprive transferees of their property and to vest the same in the bankruptcy court. This evinces both an established policy and also a due regard for the limitations upon the power of Congress. The

power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States", in Article I, § 8 of the Constitution of the United States, is subject to the provision of Amendment V, that no person shall "be deprived of life, liberty or property without due process of law." If, therefore, Congress had ever assumed authority to deprive Latham Company of their title to the property in question, except by the judgment or decree of a court of competent jurisdiction, such an act would be unconstitutional and void.

> "Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law."
>
> *Cooley's Const. Lim. (7th Ed.) 518.*

> "'It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by law the property of an individual without his consent and give it to another?'"
>
> *People* vs. *O'Brien et al., 111 N. Y. 1, 58-59.*
>
> *Wilcox et al.* vs. *Consolidated Gas Co., 212 U. S. 19, 44.*

The case of *Lazarus, Michel & Lazarus* vs. *Prentice, Receiver of Musica* (234 U. S. 263) quoted by the court below, is radically different from the suit at bar. It was a motion to dismiss an appeal to this Court, for want of jurisdiction. The interveners asserted merely an assignment, on account of attorney's fees, after a receiver of the property had been appointed in New York and the receivership extended by ancillary proceedings in New Orleans, where possession of the property was obtained. Of course, after the property had vested in the court through its receiver, the bankrupts had nothing to assign and the right of the interveners, if any, was merely to an allowance in the course of administration, as provided by the Bankruptcy Act. The Court merely held that they should present their claim to the court of original jurisdiction and that the appeal should be dismissed. It pointed out, however, the distinction between cases of that character and plenary suits concerning property claimed by others than the bankrupts. (Page 268.)

POINT II.

If the bankruptcy court were ever vested with the title and custody of the property in question, because of the adjudication of bankruptcy, it ceded jurisdiction of the proceedings in question to the courts at Mobile and Pensacola. (*Transcript in No. 98, pp. 7, 14-16; Transcript in No. 259, fols. 8, 11-13, 41; Transcript in No. 260, fols. 7, 9-12, 38-43.*)

It is common practice, when a court of equity acquires the custody of property, by a receiver or otherwise, to authorize a claimant whose right is disputed to bring an action or suit to recover the same from the receiver or other officer, in any court of competent jurisdiction. In this way, a constitutional right to trial by jury is preserved.

Walling vs. *Miller, 108 N. Y. 173, 177, 178.*
Matter of C. J. Co., 128 N. Y. 550, 553.
Fidelity Trust Co. vs. *Gaskell, 195 Fed. Rep. 865, 869-874; 115 C. C. A. 527.*

We shall see, in our next point, that the consent of the bankruptcy court is not necessary to the maintenance of a suit against a Trustee, to recover property in his possession, but its consent was granted in the suits at bar.

POINT III.

Knauth, Nachod & Kuhne had the right to invoke the aid of any other court of competent jurisdiction, even if the property in question had been in the custody of the bankruptcy court.

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts are open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."

Eyster vs. *Gaff*, 91 U. S. 521, 525.

"The bankrupt law makes no distinction between different kinds of liens, whether by mortgage, judgment or otherwise. If they have been acquired *bona fide* and are recognized by the State law, they have the same priorities and dignity as though no proceedings in bankruptcy had taken place."

Reed vs. *Bullington*, *49 Miss. 223, 225.*

"The first contention of the appellant is that the state court had no jurisdiction of the cause of action, because the fund was in the possession of the bankrupt court. We think it had jurisdiction of an action to determine and establish the plaintiff's lien. It is settled by the decision of the Supreme Court of the United States in *Bardes* v. *Hawarden Bank* (178 U. S. 524), that the bankrupt court, except by the consent of the parties, has not jurisdiction to try and determine a suit brought by a trustee in bankruptcy to recover property alleged to be part of the bankrupt's estate, or to have been transferred by him in fraud of the act, but that such suits must be prosecuted either in the state courts or in the Circuit Court of the United States, if the citizenship of the parties authorizes the action to be maintained in the latter tribunal. (See also, *First Nat. Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280.) While it is not so certain that that rule obtains in its full integrity as to a suit brought against trustees in bankruptcy, we think it was the intention of the Bankrupt Act to allow adverse claimants to property or parties claiming liens to establish their rights by suits in courts of plenary jurisdiction and not to subject such claims to summary disposition in the bankrupt court, unless it may be when the claims are frivolous or made in bad faith. * * * Of course, we do not mean to assert that under the judgment of the state court the fund or property could be taken from the possession of the bankruptcy court; the contrary is the law. It may also be that the bankrupt court could have enjoined the prosecution of this action, but it has not done

so. Apparently, it has invited the plaintiff to assert his claim by a plenary suit in a court of general jurisdiction, and we may assume that the bankrupt court will give effect to any judgment recovered therein."

Skilton vs. *Codington*, *185 N. Y. 80, 84-85, 85-86.*

"In the latter case [Skilton *vs.* Codington] the Court of Appeals by Cullen, C. J., in sustaining the jurisdiction of the state court, admirably expounds the applicable principles, with a full citation of authorities. That was a suit against the trustee, while the present case was brought by the trustee."

Frank vs. *Vollkommer*, *205 U. S. 521, 529.*

"The bankruptcy act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the State vested him with."

Hiscock vs. *Varick Bank of New York*, 206 U. S. *28, 41.*

"It was the intention of the bankruptcy law to allow adverse claimants to property, or parties having liens, to establish their rights by suits in courts of plenary jurisdiction and not to subject them to summary disposition in the bankruptcy court unless when the claims are frivolous or made in bad faith."

In re Rathman, 183 Fed. Rep. 913, 928; 106 C. C. A. 253. Cited in *Jones* vs. *Springer*, *226 U. S. 148, 155.*

"The action brought by the trustee in bankruptcy, [to set aside a fraudulent transfer and which resulted in a fund sought to be impressed with a trust] pursuant to the powers vested in him by this section [§ 70, B'k'y Act] was not in hostility to the title or rights of the plaintiff, but in subordination to the same. * * *

* * * it was proper for the plaintiff to institute a suit in equity * * * and assuming, as we must, that the sum received by the trustee in bankruptcy, in compromise of the judgment recovered by him, declaring the conveyance of the bankrupt to Cavanaugh fraudulent, stood in place of the property, which might have been reconveyed to the

trustee in bankruptcy, she would be entitled to have restored to the trust such portion of that fund as she was able to successfully follow into the purchase money paid by the bankrupt, or into the funds in the hands of the trustee in bankruptcy. * * *

The plaintiff must be permitted to follow, if she can, her trust moneys into the hands of the trustee in bankruptcy, he having no greater right against her than the bankrupt, her trustee, possessed had he remained solvent.

The other creditors of the bankrupt have no claim upon any of the funds derived from plaintiff's trust which can be fully identified.

To the extent that plaintiff is able to follow the trust funds into the purchase price of the real estate, or into the bankrupt's estate generally, she points out moneys that are no part of the estate held by the bankrupt's trustee for general distribution among the creditors, and is entitled to have them restored to the trust for her benefit which is to continue during her life."

Welch vs. *Polley*, *177 N. Y. 117*, *121*, *122*, *123*.
Reversing *86 App. Div.* 260.

So far as the foregoing may differ from the rule that obtains in courts other than bankruptcy, in suits and proceedings for the application or disposition of particular property, it rests securely on principles of public policy that inhere in § 23 and other provisions of the Bankruptcy Act.

The case under review is not only in conflict with the principles established by the above but also with the following decisions, the last of which questions its soundness, to wit:

Fidelity Trust Co. vs. *Gaskell*, *195 Fed. Rep. 865*, *869-874*; *115 C. C. A. 527*.

Lyttle vs.. *Nat. Surety Co.*, *43 App. Cases, D. C.*, *136*, *140*, *141*, *141-142*, *142*, *144*. (*1915.*)

De Friece vs. *Bryant*, *232 Fed. Rep. 233*, *236-240*.

POINT IV.

The original suits at Mobile and Pensacola were not merely *in personam*, to set aside a voidable transfer and recover a money judgment. They were *in rem*, to impound and sequester and obtain delivery of the property in question. (*Transcript in No. 98, pp. 8, 15, 16; Transcript in No. 259, fols. 8, 11; Transcript in No. 260, fols. 7, 10-11.*) **Said relief required exclusive dominion. This vested the courts with an exclusive jurisdiction and imposed the duty to hear and enforce the rights of all claimants.**

Krippendorf vs. *Hyde, 110 U. S. 276, 280, 282, 287.*

Morgan's La. and Tex. R. R. and Steamship Co. vs. *Tex. Cent. Ry. Co., 137 U. S. 171, 201.*

Farmers Loan & Trust Co. vs. *Lake Street Elevated R. R. Co., 177 U. S. 51, 61.*

Murphy vs. *John Hoffman Co., 211 U. S. 562, 569.*

Palmer vs. *Texas, 212 U. S. 118, 129.*

Rickey Land and Cattle Co. vs. *Miller & Lux, 218 U. S. 258, 262-263.*

In addition to relief requiring an exclusive dominion, which is the test of an exclusive jurisdiction, the Courts at Mobile and Pensacola impounded and sequestered the property. Clearly no other Court was open to Knauth, Nachod & Kuhne and, if there had been a subsequent failure of jurisdiction of the original suits, it would not have divested said courts of jurisdiction to hear and enforce their rights or those of any other pursuing owner.

* * * "I am satisfied that it is the duty of the court to take cognizance of the intervening petitions above referred to and to determine the

validity of the claims therein asserted and, if found valid, to give them due effect by affording the petitioners appropriate relief. If no question had arisen in regard to the jurisdiction of the court over the principal case, there could be no doubt whatever of the right of the interveners to apply to this court, it having possession and control of the property upon which the liens and claims rest, for the relief to which they were entitled. The fact that there was a latent infirmity in the jurisdiction, arising from the unlawful conduct of the parties in instituting the suit, does not, in my opinion, change the result. * * * It is the fact of the actual possession which the court has taken, and that alone, which gives to the intervener his right to appear and be heard and to have his rights ascertained and awarded to him."

Electrical Supply Co. vs. *Put-in-Bay Waterworks, Light & Ry. Co., 84 Fed. Rep. 740, 742.*
Fidelity Trust Co. vs. *Gaskell, 195 Fed. Rep. 865, 869-870, 871-874; 115 C. C. A. 527.*

In addition to the above, unknown claimants which included Knauth, Nachod & Kuhne, had been impleaded in the suit at Mobile and called upon to present their claim to the property in question to the court. (*Transcript in No. 98, pp. 22-23, 35.*) It is submitted that this vested the Court with jurisdiction to hear and enforce the rights of Knauth, Nachod & Kuhne as pursuing owners.

In addition to all of the above, the Court at Mobile had permitted Knauth, Nachod & Kuhne to intervene and file their cross bill or whatever it should be called. (*Transcript in No. 98, pp. 35, 37-38, 60.*) If the court had a discretion to deny leave to intervene, it did not exercise it and, being duly admitted to the case, Knauth, Nachod & Kuhne had the same right to have their claims heard and enforced as if they had been named as defendants in the original suit.

"In the case at bar the trial court had taken possession of all of the property * * * The Steel Company * * * was obliged to intervene * * * It could not go anywhere else. The court did permit" intervention and the issue of process

and * * * "There should be a full and fair hearing on the petition presented."

Ill. Steel Co. vs. *Ramsey, 176 Fed. Rep. 853, 863, 866; 100 C. C. A. 323.*

"In respect of any matter within the scope of the intervention, the petitioner had thereby become an actor, with liberty to present its contention and obtain an adjudication."

In re Mich. Cent. R. R. Co. 124 Fed. Rep. 727, 730; 59 C. C. A. 643.

Credits Commutation Co. vs. *United States, 177 U. S. 311, 315-316.*

The original suits were *in rem*. Neither the complainants nor the defendants resided in the Southern District of Alabama. The original suit was brought in the Circuit Court under § 23 of the Banpruptcy Act and the Act of August 13, 1888 (25 St. at L. 434), prescribing the jurisdiction of said court and continuing § 8 of the Act of March 3, 1875 (18 St. at L. 472). The jurisdiction depended on the fact that the property was within the district.

Greeley vs. *Lowe, 155 U. S. 58, 73-74.*

The fact that Knauth, Nachod & Kuhne are pursuing owners of the property impounded and sequestered by the courts at Mobile and Pensacola and their rights, therefore, are prior and paramount to the interest of the parties to the original suits only emphasizes the principle that they are entitled to have their claim heard and enforced.

"TAFT, Circuit Judge, * * * care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. * * * In other words, the relation between the two suits is principal and ancillary only so far as that, without possession of the *res* in the former suit, the court would have no jurisdiction of the latter; but, having thus acquired and thus maintaining its jurisdiction in

the second suit, the court proceeds in it without further regard to the pleading or course of the principal action. * * * The motions to dismiss * * * are denied."

Continental Trust Co. et al vs *Toledo, St. L. & K. C. Railroad Co., et al, 82 Fed. Rep. 642, 645-646.*

Toledo, St. L. & K. C. Railroad Co. et al vs *Continental Trust Co. et al, 95 Fed. Rep. 497, 505; 36 C. C. A. 155.*

POINT V.

The sale of a part of the property in question and the deposit of the proceeds and, what is the same thing, the deposit of the value or forthcoming bonds for the other parts transferred the rights of all claimants to the value and bonds in in the possession of the courts at Pensacola and Mobile.

We have shown that the bankruptcy court had no jurisdiction of the property in question because it was held adversely but, whether it had or not, the courts at Mobile and Pensacola had impounded and sequestered the property and the bankruptcy court had not claimed a right to withdraw it. In fact, it had authorized the suits. (*Transcript in No. 98, pp. 7, 14-16.*) The property was perishable because the market might break and its value depreciate. A good title had to be granted or the full value would not be paid or deposited. These circumstances warranted said courts in either selling the property free of all claims or, what is the same thing, accepting a deposit of the value or a forthcoming bond therefor. This transferred the rights of all claimants to the proceeds, whether money or forthcoming bonds, in the possession of said courts.

"The very reason of the rule that permits a good title to be given by an authority that has none con-

tradicts the limitation supposed. [*i. e.*, that only the bankruptcy court could direct a sale, although the territorial court held the property under an attachment against the bankrupt.] We are of opinion that the power of the territorial court remained. 'For necessity (which is excepted out of the law) the sale in that case is good.' 2 Inst. 168. The proceeding is *in rem.* against all the world, the sale stands, and the claim of the trustee is transferred to the proceeds, which ordinarily must be presumed to represent the fair value of the goods and take their place."

Jones vs. *Springer, 226 U. S. 148, 156-157.*

First Nat. Bank of Chicago vs. *Chicago Title & Trust Co., 198 U. S., 280, 291.*

Fidelity Trust Co. vs. *Gaskell, 195 Fed. Rep. 865, 869-874; 115 C. C. A. 527.*

POINT VI.

Apart from the fact that unknown claimants had been impleaded when the value and forthcoming bonds were deposited in Court *(Transcript in No. 98, pp. 22-23),* **the law, which authorized a pursuing owner to intervene and reclaim the proceeds of his property, entered into and constituted a part of the proceedings and subjected the deposits to that right, whether the same were in money or forthcoming bonds.**

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

Von Hoffman vs. *City of Quincy, 4 Wall. 535, 550.*

Liverpool & Gt. Western Steam Co. vs. *Phœnix Ins. Co., 129 U. S. 397, 447-448, 448, 456, 458, 459, 461.*

El Paso & S. W. R. R. Co. vs. *Eichel & Weikel, 226 U. S. 590, 597.*

POINT VII.

By impounding and sequestering the property of the petitioners-appellants and then substituting deposits of value and forth-coming bonds therefor, the courts below have deprived them of their property and, if they have no adequate right to reclaim the proceeds, it is without due process of law. (*Transcript in No. 98, pp. 126–127; Transcript in No. 259, fol. 105; Transcript in No. 260, fol. 103.*)

The Fifth Amendment of the Constitution applies to the judicial as well as the executive and legislative departments of the government.

> *Chicago, B. & Q. R. R. Co.* vs. *Chicago, 166 U. S. 226, 233–235.*

The test, whether a Federal court has power to impound and sequester property without jurisdiction to hear and enforce the rights of a pursuing owner, is to be determined not by what has been done in this case but what may be done in any case.

> "The question is to be determined not by what has been done under it in any particular instance, but what may be done under and by virtue of its authority"
>
> *Colon* vs. *Lisk, 153 N. Y. 188, 194.*
>
> *Truax* vs. *Raich, 239 U. S. 33, 39, 42–43.*

There can be no power to impound and sequester property which does not carry with it the power to hear and enforce the r ghts of a pursuing owner because it will contravene the constitution and, therefore, cannot exist. Of course, all powers are subject to constitutional rights. The courts below held that they have no jurisdiction to hear and enforce the rights of Knauth, Nachod & Kuhne. It is submitted that, if this be so, they had no power to impound and sequester their property.

The far fetched suggestion that Knauth, Nachod & Kuhne may resort to the bankruptcy court is not only unsound, as we have seen, but it ignores the prior and paramount character of their rights. They are pursuing owners of particular property. Suppose that they had filed their bills in the bankruptcy court, the Trustee would have answered that the property was in litigation at Mobile and Pensacola; and Latham & Company and Westphalen & Company would not have appeared and no decree could be rendered against them. It would not be a local action, because the property would not be there.

To sustain the right to impound and sequester property, a pursuing owner must be entitled to have his ownership heard and enforced as a matter of right and not of favor.

Coe vs. *Armour Fertilizer Works, 237 U. S. 413, 425, 426.*

POINT VIII.

By challenging the merits of the bills of complainants below, the defendants submitted to the jurisdiction. If any Federal court would have had jurisdiction, therefore, the defendants waived any right they may have had to be sued in a particular district. ***(Transcript in No. 98, pp. 100, 110, 114, 118; Transcript in No. 259, fols. 83, 91, 97; Transcript in No. 260, fols. 85, 95.)***

Thames and Mersey Marine Ins. Co., L'l'd vs. *United States, 237 U. S. 19, 24-25.*

The motions attacked the bills on many grounds but were granted for want of jurisdiction. They were not to strike out redundant matter or for a better statement of claim. They were to dismiss the bill. When the bill at Mobile was drawn, it was expected that Latham & Company would want a complete showing and that the Trustee would want all claims presented in one suit, the

evidence being likely to be about the same in each case and unknown claimants being impleaded. It was when technical objections were raised, in that suit, that Knauth Nachod & Kuhne went to Pensacola and started the suits there. If the decrees under review be reversed, the bill in the suit at Mobile will be amended so as to cover only the sequestered cotton. The bills in the suits at Pensacola follow the present Equity Rules.

POINT IX.

The right of the petitioners-appellants to follow their money into the property in question and have a trust or charge impressed on it for their benefit, is well established.

3 Pom. Eq. Juris. (3d Ed.) Secs. 1044, 1048, 1051, 1053, 1058.

Gorman vs. *Littlefield, 229 U. S. 19, 24;* and cases cited.

Zartman, Trustee in Bankruptcy vs. *First Nat; Bank of Waterloo, 216 U. S. 134, 138.*

Oliver vs. *Piatt, 3 How. 333, 401.*

Smith vs. *Township of Au Gres, Mich., 150 Fed. Rep. 257, 260; 80 C. C. A. 145.*

Lightfoot vs. *Davis, 198 N. Y. 261, 270-273, 274, and cases cited.*

Welch vs. *Polley, 177 N. Y. 117, 121, 122, 123.*

Southern Cotton Oil Co. vs. *Elliotte, 218 Fed. Rep. 567, 572,* and cases cited; *134 C. C. A. 295.*

In re Leavitt & Grant, 215 Fed. Rep. 901; 132 C. C. A. 139.

Knauth, Nachod & Kuhne vs. *Lovell, 212 Fed. Rep. 337, 338,* and cases cited.

Title Guarantee & Trust Co. vs. *Haven, 214 N. Y. 468, 487.*

The analogy between the cases above and the suit at bar is complete. In the *Elliotte* case the borrower had paid for cotton seed with the proceeds of money advanced for that purpose but failed before performing his agreement to ship the same to the lender; and equity, in effect, impressed a trust or charge on the mass of seed with which the same had been mingled, to the extent of said advances. In the *Leavitt & Grant* case, brokers had wrongfully pledged securities of their principals; and equity, in effect, impressed a trust or charge on surplus assets in the hands of the pledgee by reinstating the pledgee's lien on the proceeds of the securities and its right of set-off against deposits and subrogating said principals thereto. In the *Haven* case the trust company was induced by forgery to pay taxes on real property; and equity, in effect, impressed a trust or charge thereon by reinstating a tax lien and subrogating the trust company thereto. The above cases proceed, as should the suit at bar, on the following principle:

> "I think there should be no doubt that the plaintiffs' case is safely within the equitable doctrine that, where the just and clear rights of a party to payment of a debt from a particular fund can be secured in no other way, the fund, or its proceeds, will be regarded as a trust for his better, security. (See Vail *v.* Foster, 4 N. Y. 312, 314.) * * * I think, under the circumstances surrounding the negotiation of the sale of the draft to the plaintiffs, that the defendant took over the moneys, in question, as a fund charged with a trust for its application to their claim and that the general creditors have no equal right thereto."
>
> *Muller* vs. *Kling*, *209 N. Y. 239, 244, 245.*

In the suit at bar, the bankrupts obtained the money of Knauth, Nachod & Kuhne by fraud, perpetrated by means of forged bills of lading, and utilized the same in the redemption and purchase of the property in question. As against the bankrupts, do not the "just and clear rights" of said claimants require that the "fund or its proceeds * * * be regarded as a trust for their better security" and "as a fund charged with a trust

for its application to their claim"? The Trustee and Latham & Company and Westphalen & Company all stand in the shoes of the bankrupts and "have no equal right thereto".

Knauth, Nachod & Kuhne are the real parties in interest and entitled to maintain their suits on their own behalf. The bankrupts, who were parties to the original suit at Mobile, might also have maintained the same in the right of Knauth, Nachod & Kuhne, as trustees *ex maleficio* for their benefit.

First Nat. Bank of Patterson, N. J. vs. *Broadway Bank in the City of New York, 156 N. Y. 459, 467-468.*

National Bank vs. *Insurance Co., 104 U. S. 54, 70, 71.*

Wetmore vs. *Porter, 92 N. Y. 76, 82, 84, 85.*

The bankrupts received the money of Knauth, Nachod & Kuhne by their broker and deposited it in the First National Bank of Decatur by payment thereof to its correspondent in New York. *Qui facit per alium, facit per se.* The title to the currency drafts, by which remittance of said money was effected, remained in the bankrupts until applied to the purchase and redemption of the cotton in question. (*Transcript in No. 259, fols. 29, 35-39; Transcript in No. 260, fols. 27, 33-36; Transcript in No. 98, pp. 64, 67, 68, 69.*)

Beal vs. *City of Sommerville, 50 Fed. Rep. 647, 649-650, 651, 652; 1 C. C. A. 598.*

Richardson vs. *Louisville Banking Co., 94 Fed. Rep. 442, 448; 36 C. C. A. 307.*

St. Louis & S. F. Ry. Co. vs. *Johnston, 133 U. S. 566, 573-574, 575, 575-576.*

POINT X.

The decrees under review should be reversed with costs and the cases remanded to the United States District Court for the Southern District of Alabama and the Northern District of Florida respectively to be tried and determined on the merits.

Respectfully submitted November 10, 1916.

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Nos. 98–259–260.

Supreme Court of the United States.

KNAUTH, NACHOD & KUHNE, *Petitioners,* *vs.* LATHAM & CO. *et al.*	No. 98. October Term, 1916. Certiorari to Circuit Court of Appeals for the Fifth Circuit.
MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE), *vs.* WILLIAM S. LOVELL, AS CUSTODIAN, ETC., *et al.*	No. 259. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida.
MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE) *vs.* MAURICE E. A. WESTPHALEN *et al.*	No. 260. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida.

BRIEF AND ARGUMENT FOR WILLIAM S. LOVELL, AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ONE OF THE RESPONDENTS IN No. 98 AND ONE OF THE APPELLEES IN 259 AND 260.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

Nos. 98–259–260.

Supreme Court of the United States.

KNAUTH, NACHOD & KUHNE, Petitioners, vs. LATHAM & Co. *et al.*	No. 98. October Term, 1916. Certiorari to Circuit Court of Appeals for the Fifth Circuit.
MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE), vs. WILLIAM S. LOVELL, as Custodian, etc., *et al.*	No. 259. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida.
MAX JAFFE *et al.* (KNAUTH, NACHOD & KUHNE), vs. MAURICE E. A. WESTPHALEN *et al.*	No. 260. October Term, 1916. Appeal from the District Court of the United States for the Northern District of Florida.

BRIEF AND ARGUMENT FOR WILLIAM S. LOVELL, AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ONE OF THE RESPONDENTS IN No. 98 AND ONE OF THE APPELLEES IN 259 AND 260.

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Statement of the Case.

By order of this Court the three cases are to be heard together. All of the cases grow out of the bankruptcy of Knight, Yancey & Company, a firm doing business at Decatur, Alabama. This firm was adjudged bankrupt in the District Court of the United States for the Northern District of Alabama on April 20, 1910. Two receivers of their estate, Clarence E. Frost and William S. Lovell, were immediately appointed, and on May 26, 1910, William S. Lovell, appellee, was appointed trustee of said bankrupts.

There were at Mobile, Alabama, and at Pensacola, Florida, large quantities of cotton in process of shipment abroad, to which said receivers and afterwards the trustee of the bankrupts laid claim on behalf of the bankrupt estate. The cotton at Mobile was about to be loaded on a ship, the *Meltonian*, and that at Pensacola was in the possession of the Lousiville & Nashville Railroad. The cotton at Mobile was claimed adversely to the trustee in bankruptcy by Latham & Company, of Havre, France, and that at Pensacola was so claimed partly by said Latham & Company and partly by Westphalen & Company, also of Havre, France. Both Latham & Company and Westphalen & Company claimed to be purchasers from Knight, Yancey & Company of the portions of the cotton claimed by them respectively. Under the rulings of the Circuit Court of Appeals, Fifth Circuit, they were such purchasers.

Lovell, Trustee, v. *Newman*, 192 Fed. 753.

Immediately after the adjudication in bankruptcy, the receivers and a creditor of the bankrupt estate filed a bill in equity in the Circuit Court of the United States for the Southern District of Alabama, at Mobile, against Latham

& Company and others, the object of which bill was to enjoin the removal of the cotton at Mobile above referred to from the jurisdiction of the court, and to set aside what was charged to be a preferential transfer thereof made by the bankrupts to Latham & Company shortly before the bankruptcy (Record in No. 98, page 3). The Circuit Court granted a temporary injunction restraining the removal of said cotton, and ordering it seized, on certain conditions, Record No. 98, page 17, and thereupon, upon the petition of Latham & Company, the adverse claimants of said cotton, they were permitted to give bond which appears on page 28 of the record in case No. 98, and to take the cotton. After this bond was given, Knauth, Nachod & Kuhne sought to be made parties to this litigation at Mobile (Record in No. 98, pages 33, 35, 60, 61), claiming, broadly speaking, that they had been defrauded of certain money by the bankrupts, Knight, Yancey & Company, and that this money could be traced into undefined portions of the cotton, the subject matter of the litigation between the receivers and trustee (he being substituted as a party for the receivers) of Knight, Yancey & Company and Latham & Company. Said Knauth, Nachod & Kuhne appeared in this litigation at Mobile by a pleading called by them a cross-bill. Upon the motion of said William S. Lovell, Trustee in Bankruptcy, this cross-bill was stricken from the files. The opinion of the District Judge striking it is at page 102 of the record in case No. 98. From this order of dismissal Knauth, Nachod & Kuhne took an appeal to the Circuit Court of Appeals for the Fifth Circuit, by which court the order of the District Court was reversed and the case remanded, 200 Fed. Rep. 403. The opinion of the Circuit Court of Appeals seems to proceed on the idea that the motion to strike was not the proper pleading by which to

obtain a dismissal. On the remandment of the case, upon motion to dismiss for want of equity, etc., the District Court dismissed the cross-bill, 211 Fed. Rep. 374. The last mentioned decree of dismissal was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 219 Fed. Rep. 721.

Upon the petition of Knauth, Nachod & Kuhne, the Supreme Court granted its writ of *certiorari* to the Circuit Court of Appeals for the Fifth Circuit to review the case.

For convenience of statement the case above described, No. 98, will be referred to as the Mobile case.

Proceeding now with a description of the litigation brought by appeal from the District Court for the Northern District of Florida, Nos. 259 and 260: Immediately after the appointment of the receivers of Knight, Yancey & Company, they, together with a creditor of the bankrupt estate, instituted proceedings in the District Court of the United States for the Northern District of Florida, the object of which was to prevent the removal of the cotton at Pensacola, Florida, which was claimed to be assets of the bankrupt estate, and which cotton was in the possession of the Louisville & Nashville Railroad Company. A temporary injunction was issued by the District Court of the United States for the Northern District of Florida, restraining the Louisville & Nashville Railroad Company from disposing of the cotton. As stated, this cotton at Pensacola was claimed on the one hand by the receivers and trustee in bankruptcy of Knight, Yancey & Company and on the other hand in part by Latham & Company and in part by Westphalen & Company. Accordingly, suit was instituted in what was then the Circuit Court of the United States for the Northern District of Florida by the trustee in bankruptcy of Knight, Yancey & Company against

Latham & Company and the Louisville & Nashville Railroad Company, charging that a certain lot of the cotton in the possession of the Railroad Company had been preferentially transferred by the bankrupts to Latham & Company prior to the bankruptcy, and that it was recoverable by the trustee. The only account of this litigation brought at Pensacola, Florida, by the trustee in bankruptcy against Latham & Company is contained in the amended bill of Knauth, Nachod & Kuhne against William S. Lovell, No. 259 in this court. According to the amended bill of Knauth, Nachod & Kuhne (Case No. 259, Record, pages 4-5), there were two lots of this cotton. By order of the Circuit Court Latham & Company were permitted to take one lot of this cotton upon giving bond, and likewise under court order, the other lot was sold by William S. Lovell, trustee in bankruptcy, and the proceeds of the cotton deposited in the First National Bank of Pensacola, Florida, to abide the decree of the court.

After this disposition of the cotton, Knauth, Nachod & Kuhne filed an original bill in the District Court of the United States for the Northern District of Florida which contained in substance the same averments as were contained in the so-called cross-bill filed by them in the litigation at Mobile; that is to say, they again set up that they had been defrauded by the bankrupts of $98,005.58 shortly prior to their bankruptcy, and that they could trace the money out of which they were so defrauded into an undefined portion of the cotton which had been claimed on the one hand by the trustee in bankruptcy of Knight, Yancey & Company and on the other hand by Latham & Company. For convenience this suit will be referred to herein as the suit between the trustee in bankruptcy and Latham & Company at Pensacola. Defend-

ants, Lovell, Trustee, Latham & Company, and the surety on the bond last referred to, American Surety Company of New York, moved the court to dismiss this bill of Knauth, Nachod & Kuhne, and the motion was granted, and from this order the appeal No. 259 is taken.

The other case, No. 260, arose in this way: The remainder of the cotton at Pensacola not claimed adversely to the trustee in bankruptcy by Latham & Company was so claimed by Westphalen & Company. Westphalen & Company filed their bill in the Circuit Court of the United States for the Northern District of Florida at Pensacola against said Lovell as trustee in bankruptcy and the said Louisville & Nashville Railroad Company, setting up that the cotton so claimed by Westphalen & Company was in fact their cotton and was not assets of the bankrupt estate. The cotton the subject matter of this litigation was by the agreement of the parties to it, that is to say, Lovell as trustee on the one hand, and Westphalen & Company and the Louisville & Nashville Railroad Company on the other hand, sold, and the proceeds deposited in bank at Pensacola, Florida, to abide the result of the litigation. This disposition of the cotton was made by agreement of the parties to the case and not by order of court (Record, No. 260, page 4). After this was done Knauth, Nachod & Kuhne filed their original bill in the District Court of the United States for the Northern District of Florida against the trustee in bankruptcy, Westphalen & Co., and the Louisville & Nashville Railroad Company, which bill was substantially the same as the cross-bill filed by them in the litigation at Mobile and substantially the same as the original bill filed by them at Pensacola against the Trustee in Bankruptcy and Latham & Company. This bill of Knauth, Nachod & Kuhne was on the motion of the trus-

tee in bankruptcy and of Westphalen & Company dismissed by the District Court, and from this decree of dismissal this appeal is taken.

Summarizing the above statement, the court will observe that there was a suit of the trustee in bankruptcy of Knight, Yancey & Company at Mobile, Alabama, against Latham & Company seeking to recover certain cotton which was claimed to have been transferred preferentially by the bankrupts to Latham & Company, and that Knauth, Nachod & Kuhne sought to appear in this litigation and assert that they had a title to the subject matter of the litigation paramount to either that of the trustee or of Latham & Company. They appeared at Pensacola, Florida, by two original bills which referred to the litigation instituted by the receivers and trustee of the bankrupts at Pensacola, Florida. One of these original bills referred to the litigation between the trustee in bankruptcy of Knight, Yancey & Company on the one hand and Latham & Company on the other, and set up that Knauth, Nachod & Kuhne had a paramount title to that of either the trustee in bankruptcy or Latham & Company to the cotton which in the first instance was the subject matter of that litigation. The other original bill of Knauth, Nachod & Kuhne brought by them at Pensacola, Florida, set up an alleged similar paramount title in Knauth, Nachod & Kuhne to the cotton which in the first instance was the subject matter of the litigation in the suit at Pensacola, Florida, in which Westphalen & Company were plaintiffs and Lovell as trustee in bankruptcy defendant.

All three of these proceedings brought by Knauth, Nachod & Kuhne were brought after the cotton which had been seized in the several suits or proceedings instituted by the receivers and trustee in bankruptcy of Knight, Yancey & Company had been disposed of in litigation

between the trustee in bankruptcy on the one hand and the adverse claimants thereof on the other.

Neither the cross-bill of Knauth, Nachod & Kuhne in the suit at Mobile nor either of the original bills brought by them at Pensacola sought to identify the cotton into which Knauht, Nachod & Kuhne charged in general terms their money went. These pleadings were identical in their general averments with a fourth suit brought by them against the trustee in bankruptcy of Knight, Yancey & Company in the District Court of the United States for the Northern District of Alabama, that being the court in which the bankruptcy proceedings were pending. The insufficiency of this last mentioned bill is pointed out by Grubb, District Judge, in his opinion on a motion to dismiss the case,

Knauth, Nachod & Kuhne vs. *Lovell*, 212 Fed. Rep. 337.

The manner in which Knauth, Nachod & Kuhne were defrauded is the same as that employed by the bankrupts on their other creditors. (Answer of Lovell, Trustee; Record, No. 657, page 24; Lovell *vs.* Newman, 192 Fed. 753; Hentz *vs.* Lovell, 192 Fed. 762; Borden & Haac *vs.* Lovell, 203 Fed. 234.)

None of the bills filed by Knauth, Nachod & Kuhne specify into what assets of the bankrupt estate or into what other property the money of the pleaders went. In this connection the attention of the court is particularly called to the prayers of the several bills, to Paragraph 16 of the cross bill filed in case No. 98, appearing at pages 69-70 of the record in that case, and to the 21 schedules attached as exhibits to that cross bill which appear at pages 76-96 of the record, and to the captions at the commencement of each of these twenty-one schedules. The mere fact that these schedules embrace property according

to the valuations placed opposite the several items of many times over the amount of Knauth, Nachod & Kuhne's losses, as well as the vague phraseology employed in the captions to the several schedules to describe the interest of Knauth, Nachod & Kuhne in the property therein embraced, show that there is no effort at particularizing the property which they claim to be theirs.

In case No. 259 the following excerpt from the bill in that case (paragraph 7, page 13) shows that there is no effort in that case to specify the cotton into which Knauth, Nachod & Kuhne claim their money went:

> "After said First National Bank of Decatur had received said moneys, including the moneys of said Knauth, Nachod & Kuhne, the same were all disbursed by said bank, at the instance of said Knight, Yancey & Company, in the purchase and redemption of certain cotton, *including a part of the cotton or the bills of lading therefor* set forth in Schedule 1 and Schedule 2 hereto annexed. Said Schedule 1 and Schedule 2 hereto annexed *include certain cotton or the bills of lading therefor*, exceeding three thousand dollars in value, that was thus purchased and redeemed with said moneys of said Knauth, Nachod & Kuhne."

In case No. 260, the following excerpt from the bill (paragraph 3, page 4, record) reveals a like infirmity to those above referred to:

> "The complainants, Knauth, Nachod & Kuhne, assert an interest *in a part of said cotton or in the proceeds thereof that is prior and paramount both to that of said Westphalen & Company and to that of said Lovell as Trustee.*"

BRIEF OF THE ARGUMENT.

I.

In neither of the three cases was there any *res* in the possession of the court which could be made the subject of a decree in favor of Knauth, Nachod & Kuhne. Neither the United States Circuit Court at Mobile nor the United States Circuit Court (afterwards District Court) at Pensacola assumed jurisdiction of the suits between the Trustee in Bankruptcy on the one hand and Latham & Company and Westphalen & Company on the other, for the purpose of administering the subject matter thereof for whomsoever might be interested in it. These suits were plenary suits; they were not proceedings in bankruptcy. They were for the purpose of trying title as between the parties thereto, and only such title as these parties set up. The cottton which Knauth, Nachod & Kuhne charge their money went into had been released before they appeared. They were at liberty to follow it. They were not estopped by anything in the pleadings in these suits from asserting any right or title in the cotton wherever they might find it. They were not entitled to any equitable relief *in personam* against either the Trustee, Latham & Company, or Westphalen & Company. The proceedings were not *in rem*, but were *quasi in rem*. Brown on Jurisdiction, Secs. 59-*a*, 83*a*.

The general rule has thus been stated:

> "On this principle (that a judgment in order to operate as an estoppel, must be rendered pursuant to pleadings involving a contention in settlement of which the judgment is pleaded), where the title or right to property was not directly put in issue in a suit, the judgment concludes nothing in regard to it although the property formed the subject matter

of the suit, and although certain titles or rights of the parties were alleged in the pleadings or tacitly assumed as the basis of the judgment." (23 Cyc., page 1316.)

The above general statement is supported by

Roberts vs. *No. Pac. R. R. Co.*, 158 U. S. 1, tenth head-note;
Cromwell vs. *Sac County*, 94 U. S. 351;
Freeman on Judgments, Sec. 257;
Humes vs. *Scruggs*, 64 Ala. 40.

On the cases cited by appellants under their point IV, page 23, appellants' brief, the following comment is made:

In *Kripendorf* v. *Hyde*, 110 U. S 276, the property involved had been taken out of the possession of a third party by attachment; he claimed the property as his own but was not a defendant in attachment; having given bond to have the property forthcoming in the attachment suit, and having subsequently paid the penalty of the bond into Court, he was permitted to propound his title to the attached property by an equity suit involving the money paid into Court.

He had become a party to the attachment suit by giving bond in it for property which had been taken from him.

Morgan's La. & Tex. R. R., etc., Co. v. *Tex. Cent. Ry. Co.*, 137 U. S. 171; *Farmers Loan & Trust Co.* v. *Lake St. Elevated R. R. Co.*, 177 U. S. 51; *Palmer* v. *Texas*, 212 U. S. 118, and *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258, were all either foreclosure or receivership cases involving real estate which the several Courts had impounded.

Murphy v. *John Hoffmen Co.*, 211 U. S. 562, involved proceedings with reference to property actually in the possession of a Bankruptcy Court for administration.

II.

While it was charged in the bill of the Receivers at Mobile that unknown persons claimed some right, title and interest in the cotton there sought to be seized, and it was prayed that they be made defendants (record No. 98, page 22), this general averment and prayer could not cut off any such right in the cotton as appellants assert in it since there is no description in the pleadings of any such claim in the cotton as appellants assert nor any reference to them in those pleadings. If the averment had any effect, it could only relate to persons claiming under Latham & Company. (See motion to amend, striking out this averment. Record, No. 98, pages 96-7. Order allowing amendment, page 104.) Appellants-petitioners were never cited by publication or otherwise to appear in the case; they made the averment referred to a pretext for beclouding the case with issues foreign to it.

III.

While the proceedings at Pensacola were commenced by a proceeding which might be deemed an ancillary one in bankruptcy, the purpose of that proceeding had been accomplished before appellants appeared, and their appearance was in no event in bankruptcy, but by bill in a plenary suit. Lovell's plea in abatement in No. 260, page 29 and the averments of the two bills.

IV.

The purposes of the cross bill in the suit at Mobile, No. 98, bore no relation to the purposes of the original suit. The objects of the cross bill were to assert a title to the

cotton which was independent of any claim of title relied on by complainants or defendants, and to administer the entire bankrupt estate, including the disposition of suits in other jurisdictions (cross bill, paragraph 16, page 69). Appellants had nothing to offer by way of defense to the original suits. They were not interested in any way in the question of whether a preference had been given or not. Under these circumstances, the cross bill was properly dismissed.

Providence Rubber Co. vs. *Goodyear's Ex.*, 9 Wallace 807;
Ayres vs. *Carver*, 17 Howard 591;
Cross vs. *De Valle*, 1 Wallace 1;
Dickerman vs. *Northern Trust Co.*, 80 Federal 450;
Harrison vs. *Perea*, 168 U. S. 311.

V.

The cross bill was aggravatedly multifarious. The effort of the court to inquire into all the subjects set up in it would reduce the litigation to chaos. The court could, under the circumstances, have dismissed the bill of its own motion.

Oliver vs. *Piatt*, 3 How. 333, 412.

VI.

It is immaterial that the Trustee did not ask the court to annul its order giving appellants leave to file their amended cross bill in No. 98. As a matter of law, that order pre-supposed that the amended cross bill would be

such as might properly be filed. In addition, the court gave the leave subject to such objections as might be made by adverse parties. The order pre-supposed that the amended cross bill would be a proper pleading, and upon its developing that it was not, the court might dismiss it without putting the Trustee to a motion.

Dickerman vs. *Northern Trust Co.*, 80 Fed. 450; 25 C. C. A. 549.

VII.

The same rules that apply to a cross bill should apply to the analogous proceedings brought by appellants at Pensacola. These proceedings seek to fasten themselves on the suits between the Trustee and Latham & Company and the Trustee and Westphalen & Company. But they are in no sense germane to those suits.

VIII.

Petitioners-appellants had no lien on the bankrupt estate for their losses. Nor did they point out into what cotton or other property or assets their money went. For this reason if for no other their bills were properly dismissed.

In re See, 209 Fed. 172 (C. C. A. 2d Cir.).

Board of Commissioners vs. *Strawn*, 157 Fed. 49; 84 C. C. A. 553; 15 L. R. A. (N. S.) 1100.

In re Brown, 193 Fed. 24, 30; 113 C. C. A. 348; affirmed First Nat. Bank *v.* Littlefield, 226 U. S. 110.

Knauth, Nachod & Kuhne v. *Lovell*, 212 Fed. 337.

Empire Surety Co. v. *Carroll County*, 194 Fed. 593; 114 C. C. A. 435.
Re McIntyre, 185 Fed. 96; 108 C. C. A. 543.
Lowe vs. *Jones*, 192 Mass. 94.
Schuyler vs. *Littlefield*, 232 U. S. 707.

IX.

Substantially the same bill filed by petitioners here was filed by them in the New York State Courts with reference to losses sustained by them under the same circumstances that they here set up and the bill was held to be without equity.

Jaffe vs. *Weld*, 132 N. Y. Supplement 505; affirmed by Appellate Division, 139 N. Y. Suppl. 1101; affirmed by Court of Appeals, 102 N. E. 1104.

X.

Under the motions made the bills could be dismissed under Equity Rule 29.

Victor Talking Machine Co. vs. *Strauss*, 230 Fed. 449.
Central Trust Co. vs. *Denver, etc., R. R. Co.*, 219 Fed. 110–113;
Wilson vs. *American Ice, etc., Co.*, 206 Fed. 736.

XI.

Whether the reasons given by the District Court for the Northern District of Florida and the Circuit Court of Appeals for the Fifth Circuit for dismissing the bills were correct or not, they should have in any event been dismissed on other grounds and appellants cannot complain.

It is respectfully submitted that the decrees appealed from should be affirmed and the writ of *certiorari* dismissed.

Respectfully submitted,

AUGUSTUS BENNERS,
Attorney for William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, Appellee and Respondent.

Birmingham, Alabama, November 17, 1916.